

1989

Parental Separation and the Child Custody Decision: Toward a Reconception

David G. Duff

Allard School of Law at the University of British Columbia, duff@allard.ubc.ca

Roxanne Mykitiuk

Follow this and additional works at: http://commons.allard.ubc.ca/fac_pubs



Part of the [Family Law Commons](#)

Citation Details

David G Duff & Roxanne Mykitiuk, "Parental Separation and the Child Custody Decision: Toward a Reconception" (1989) 47:3 UT Fac L Rev 874.

This Article is brought to you for free and open access by the Faculty Scholarship at Allard Research Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Allard Research Commons.

Parental Separation and the Child Custody Decision: Toward a Reconception

DAVID G. DUFF AND ROXANNE MYKITIUK

Contemporary debates regarding the appropriate way to resolve custody and access disputes reflect deeply rooted conceptions of both the family and the proper relationship between the family and the state. The prevailing "best interests of the child" test and judicial presumptions favouring sole custody embody a traditional definition of the family and a communitarian image of familial relationships. Conversely, current joint custody legislation adopts a liberal-contractual paradigm, in which the family is viewed as a joint partnership and children are conceived as assets to be equally divided upon termination of the spousal relationship. The authors reject both notions of the family and the standards for custody determination associated with each. Instead, they advance a feminist vision of the family and a feminist approach to the resolution of access and custody disputes.

Le débat actuel sur les problèmes de droits de garde et de visite reflète des conceptions fondamentales sur la famille et sur la relation entre la famille et l'Etat. Le test fondé sur "le meilleur intérêt de l'enfant" qui prévaut encore aujourd'hui et la tendance des cours de justice à préférer la garde unique reposent sur une définition traditionnelle de la famille et sur une image communautaire des relations familiales. Par contraste, la législation actuelle sur la garde conjointe adopte une perspective libérale et contractuelle, où la famille est considérée comme une association conjointe et les enfants comme des biens à partager également lors de la rupture du lien matrimonial. Les auteurs rejettent à la fois la conception de la famille et les critères pour la détermination du droit de garde proposés par les deux options. A leur place, elles développent une vision féministe de la famille et une approche féministe au problème des conflits sur les droits de garde et de visite.

* This paper is an abridged version of a substantially longer work in progress. We are extremely grateful to Carol Rogerson, Kathleen Gallivan and Jeremy Paltiel for invaluable comments on numerous sections of this paper. We are also indebted to the students in Professor Rogerson's "State, Law and Family" class (Spring 1988) for making the course an especially rewarding learning experience.

Introduction

[C]ourts perform two very different functions in the resolution of child custody disputes: private-dispute-settlement and child protection. The *private-dispute-settlement* function is involved when the court must choose between two or more private individuals, each of whom claims an associational interest with the child. While such a dispute is ordinarily between adults, it obviously also affects the child The second function, *child-protection*, involves the judicial enforcement of standards of parental behavior believed necessary to protect the child.¹

When spouses or unmarried partners choose to separate, they invariably experience the difficult process of disentangling the myriad aspects of their lives that have been intermingled throughout the period of cohabitation. Where children are involved, this task is particularly onerous. First, as King Solomon clearly illustrated,² children are not like chattels or property: they cannot be sold or divided, with equal portions given to the disputants who are then free to go their separate ways.³ On the contrary, children are human beings whose own needs and wishes must be taken into account in any post-separation custody arrangement. Second, to the extent that both parents desire a continued relationship with the child, each must of necessity maintain some association with the other. This result, however, not only contradicts the very rationale for separation in the first place, but may also be unsatisfactory from the perspective of the child. At the extreme, continued parental association may pose substantial risks to the welfare of the child.

Despite these obstacles, all the evidence suggests that more than 90 percent of all separating families manage to settle their own arrangements for post-separation child custody without resort to the authoritative ruling of a court.⁴ In these instances, unless the possibility of existing or impending harm to the child comes to the attention of the child protection authorities or the court,⁵ the law is largely content to leave such matters up to the independent decisions of the families themselves. Where the families cannot agree, however, any member⁶ may apply to a court "for an order respecting custody of or access to the child or determining any aspect of the incidents of custody of a child."⁷ The law is then faced with the difficult task of sorting out and

1. Robert Mnookin, "Child Custody Adjudication—Judicial Functions in the Face of Indeterminacy" (1975), 39 *Law and Contemporary Problems* 226 at 229.

2. *Kings* 3:24–28.

3. Provincial legislation adopts this approach to the division of family property at marriage breakdown. See, e.g., *Family Law Act*, S.O. 1986, c. 4, Part I [hereinafter FLA].

4. Katherine Catton, "Children in the Courts: A Selected Empirical Review" (1978), 1 *Can. J. Fam. L.* 329 at 340.

5. See Berend Hovius, *Family Law: Cases, Notes and Materials*, (Toronto: Carswell, 1987) at 726–38.

6. Provincial legislation stipulates that an application may be initiated by "[a] parent of a child or any other person": *Children's Law Reform Act*, R.S.O. 1980, c. 68 [as am.], s. 21 [hereinafter CLRA]. Thus, the Act explicitly contemplates the possibility of an application brought by a child.

7. *Ibid.* See also *ibid.* s. 28; and *Divorce Act*, 1985, S.C. 1986, c. 4, ss. 16(4), (6) [hereinafter DA (1985)].

assigning the "bundle of parental rights and obligations" that, while typically divided during the period of cohabitation, remained undifferentiated in the eyes of the law. At the same time, it must take care that neither the outcome nor the process of this determination causes significant injury to the welfare of the child. The first task is that of private or intra-familial dispute-settlement; the second constitutes child protection.

The distinction between these two forms of legal intervention is crucial to understanding the law of child custody.⁸ Since the specific outcome in any given custody dispute is shaped fundamentally by the decision maker's conception of the task before it, the comparative importance which a given legal system attaches to the goals of private dispute-settlement and child protection governs the character of custody decisions within that jurisdiction. More generally, the relative weight given to each role in the context of custody disputes has profound implications for the manner in which a society defines the position of children within the family, and the relationship between the family and the state.⁹ Where the custody decision is conceived primarily from the perspective of intra-familial dispute-settlement, the law emphasizes family autonomy by looking to the norms and patterns of familial relationships themselves to determine the outcomes of specific custody disputes. Where custody law is primarily informed by notions of child protection, on the other hand, the resolution of the custody decision is based upon societal norms concerning appropriate family structures and methods of child rearing.

This paper explores the character of the custody decision and advances an alternative approach to that adopted both in contemporary custody law concerning disputes between divorced or separated parents, and in current proposals for the substantive reform of these principles. First, we consider the institution of the family and the role of law in family conflict.¹⁰ In contrast to traditional communitarian and liberal conceptions, we develop a feminist approach to understanding both the family and the legal resolution of intra-familial disputes. Second, we review the basic structure of contemporary custody law to determine the extent to which it emphasizes the functions of dispute-settlement or child protection.¹¹ Noticing a clear priority of child protection principles over those of private dispute-settlement, we trace the legal emphasis on this latter function to traditional communitarian conceptions of the family as a "natural" sphere of human interaction to which legal regulation is antithetical. Third, we survey the broad contours of Canadian custody determinations to critique the manner in which this child protection rationale manifests itself in the context of

8. For a contrary opinion, claiming that this distinction recalls "the stultifying common-law forms of action," and obscures the common problem of "how and to what extent the law can, through the manipulation of a child's external environment, protect his physical and emotional development," see Joseph Goldstein, Albert Solnit and Anna Freud, *Beyond the Best Interests of the Child*, (New York: Macmillan, 1973) at 5.

9. Mnookin, *supra*, note 1 at 265.

10. *Infra*, notes 16-128 and accompanying text.

11. *Infra*, notes 129-166 and accompanying text.

specific custody disputes.¹² Fourth, we examine the two leading proposals for substantive custody reform: a judicial presumption favouring sole custody to the child's primary caregiver,¹³ and a legislative presumption of joint custody to both parents following separation or divorce.¹⁴ While each reform promises distinct improvements upon the current custody regime, neither fully escapes the insidious logic of the child protection principle, and neither realizes the contextual and relational approach to intra-familial dispute-settlement that we endorse as a model for the resolution of custody disputes. Finally, while this contextual model makes it impossible to formulate *a priori* outcomes to actual custody disputes, we offer some suggestions for the implementation of an adjudicative approach along the lines that we develop.¹⁵

Law and the Family

The dominant tendencies in contemporary family literature and legal discourse are to treat the family as either a "natural" and homogeneous form of social organization¹⁶ or, more recently, as a contractual unit created and dissolved by the independent will of its founding members,¹⁷ and to conceive of autonomy as opposition and isolation.¹⁸ As a result, "family autonomy" is conventionally understood either as the separation of the sphere of "natural" familial interaction from the rest of society (and, above all, as the exclusion of these "private" family relationships from regulation by law),¹⁹ or (consistent with contractarian principles of individual rights, voluntariness and self-sufficiency) as the liberty of family members to determine the form and content of their own relationships free from public regulation.²⁰ This section examines each notion of family privacy,²¹ challenges the presuppositions on which they are based,²²

12. *Infra*, notes 167–289 and accompanying text.

13. *Infra*, notes 298–365 and accompanying text. While this presumption is generally referred to as that of the "primary caretaker" we prefer to follow Susan Boyd in defining the role as one of *caregiving* since this term describes the nature of the relationship far more accurately: Susan Boyd, "Child Custody, Women's Work and Ideology" Paper Presented at The Clara Brett Martin Workshop, University of Toronto Faculty of Law (October 21, 1988) at 3. The expression was originally suggested to us by Kathleen Gallivan.

14. *Infra*, notes 366–414 and accompanying text.

15. *Infra*, notes 361–365, 412–414 and accompanying text.

16. See Margrit Eichler, *Families in Canada Today: Recent Changes and Their Policy Consequences*, (Toronto: Gage, 1983) at 1–61.

17. Within this paradigm, therefore, children are typically conceived not as independent contractual interlocutors, but instead as the property of the autonomous adult actors.

18. See Jennifer Nedelsky, "Reconceiving Autonomy: Sources, Thoughts and Possibilities" (1989), Yale J. Law & Feminism (forthcoming).

19. Katherine O'Donovan, *Sexual Divisions in the Law*, (London: Weidenfeld and Nicolson, 1985) at 2–11.

20. For a critical commentary on this approach to domestic agreements, see David G. Duff, "The Supreme Court and the New Family Law: Working Through the *Pelech* Trilogy" (1988), 46 U.T. Fac. L. Rev. 542 at 551–67.

21. *Infra*, notes 24–54 and accompanying text.

22. *Infra* notes 55–116 and accompanying text.

and develops an alternative conception of legal dispute resolution consistent with the more contextual and relational understanding of the family that we prefer.²³

FAMILY PRIVACY

Conventional notions of family autonomy originate in classical liberalism and traditional approaches to anthropology and sociology. The former interprets autonomy as separateness, and views the delineation of fixed boundaries between individuals, and especially between individuals and the state, as a necessary condition of political freedom.²⁴ The latter defines The Family itself as a specific form of individual: a single, organic unit, biologically determined and indivisible. In combination, they establish two distinct but related justifications for the preservation and encouragement of family privacy: a socio-biological rationale, based on the presumed functional imperatives of sound family life; and a political rationale, premised on the supposed relationship between family privacy and individual liberty.

The Natural Family

Traditional anthropology conceives of The Family as a natural organism with social roles biologically dictated by their functional relationship to the larger whole. Beginning with Bronislaw Malinkowski's work on the aboriginal peoples of Australia,²⁵ anthropologists have conventionally defined this "universal function" as the nurturing of children. On this basis, they have typically identified three features as intrinsic to the very notion of The Family by virtue of their functional relationship to the task of child rearing.²⁶ First, families have to have "clear boundaries":

... for if families [are] to perform the vital function of nurturing children, insiders [have] to be distinguishable from outsiders so that everyone [can] know which adults [are] responsible for the care of which children.²⁷

Second, families must have "a place where family members [can] be together and where the daily tasks associated with child rearing [can] be performed."²⁸ In other words, families require "a definite physical space, a hearth and home."²⁹ Finally, families are characterized by "a particular set of emotions, family love."³⁰ As

23. *Infra*, notes 117–28 and accompanying text.

24. See, e.g., David Sugarman, "The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science" (1982), 46 *Mod. L. Rev.* 102.

25. Bronislaw Malinkowski, *The Family Among The Australian Aborigines*, (London: University of London Press, 1913).

26. See Jane Collier, Michelle Z. Rosaldo and Sylvia Yanagisako, "Is There a Family? New Anthropological Views," in Barrie Thorne, ed., *Rethinking the Family: Some Feminist Questions*, (New York: Longman, 1982) 25 at 25–28.

27. *Ibid.* at 26.

28. *Ibid.* at 26–27.

29. *Ibid.* at 27.

30. *Ibid.*

Malinkowski and theorists since him have argued, the "long and intimate association among family members," necessitated by the task of child rearing, fosters "close emotional ties, particularly between parents and children, but also between spouses."³¹ Indeed, for Sigmund Freud and those following him, this family intimacy represents the *sine qua non* of healthy emotional development in children.³² According to Joseph Goldstein, for example:

Such constantly ongoing interactions between parents and children become for each child the starting point of an all-important line of development that leads to adult functioning. Helplessness requires total care and over time is transformed into the need or wish for approval and love. It fosters the desire to please by compliance with the parent's wishes. It provides a developmental base upon which the child's responsiveness to educational efforts rests. Love for parents leads to identification with them, without which impulse control and socialization would be deficient.³³

For German sociologist Ferdinand Tonnies, writing at the end of the nineteenth century,³⁴ this portrayal of family life was neatly summarized in the theory of *Gemeinschaft* or community.³⁵ In this organic world of "intimate, private, and exclusive living together,"³⁶ relationships are "mediated by love, duty and a common understanding and purpose," and justice is conceived as the altruistic suppression of individual interests so as to avoid conflict and preserve social harmony.³⁷ Indeed, Tonnies explains that

the theory of *Gemeinschaft* starts from the assumption of perfect unity of human wills as an original or natural condition which is preserved in spite of actual separation.³⁸

In opposition to this private sphere, Tonnies theorized, is the "mechanical" and "artificial" world of "public life" or *Gesellschaft* (society).³⁹ Conceived as "mere coexistence of people independent of each other,"⁴⁰ this public domain of politics and commerce is constituted by interaction among equal atomistic individuals, each

31. *Ibid.*

32. See, e.g., Sigmund Freud, *Inhibitions, Symptoms, and Anxiety*, (1926), Standard Edition, vol. 20 (1959). For two more current Freudian interpretations, see Goldstein, Solnit and Freud, *supra*, note 8; and Christopher Lasch, *Haven in a Heartless World: The Family Besieged*, (New York: Basic Books, 1977).

33. Joseph Goldstein, "In Whose Best Interests?" in Jay Folberg, ed., *Joint Custody and Shared Parenting*, (Washington, D.C.: Bureau of National Affairs, 1984) 47 at 50.

34. Ferdinand Tonnies, *Community and Society (Gemeinschaft und Gesellschaft)*, Charles P. Loomis Trans. (East Lansing: Michigan State University Press, 1957), (originally published 1887).

35. *Ibid.* at 37-64.

36. *Ibid.* at 33.

37. O'Donovan, *supra*, note 19 at 4.

38. Tonnies, *supra*, note 34 at 37.

39. *Ibid.* at 33, 35. See also the section on the Theory of *Gesellschaft*: *ibid.* at 64-102.

40. *Ibid.* at 34.

pursuing his (typically) own self-interest.⁴¹ Here, justice emphasizes "formality, neutrality of adjudication, precision, rationality and predictability," and individuals are viewed as "abstract right and duty-bearing entities."⁴² Thus, while "public" interaction is governed by the Rule of Law, the constitution of this communitarian version of the "private" family is the pre-contractual State of Nature.⁴³

On this analysis, it follows, to subject intra-familial relationships to legal regulation would be to undermine precisely those values that define The Family as such. As one commentator has recently argued:

[T]he very appeal to law ... is atomistic in that it circumvents the ... standards of family decision: private persuasion and eventual accommodation based on solicitude for the person with whom one disagrees.⁴⁴

For others, legal "intervention" in family life would contradict the most essential requirements of proper child development, thereby endangering the very future of humanity.⁴⁵ In Goldstein's opinion, for example:

These complex and vital developments require the privacy of family life under guardianship by parents who are autonomous. When family integrity is broken or weakened by state intrusion, the child's needs are thwarted and the belief that parents are omniscient and all-powerful is shaken prematurely. The effect on the child's developmental progress is invariably detrimental. The child's need for safety within the confines of the family must be met by law through its recognition of family privacy as the barrier to state intrusion upon parental autonomy in child rearing. These rights – parental autonomy, a child's entitlement to autonomous parents, and privacy – are essential ingredients of "family integrity."⁴⁶

Thus, it is argued, The Family must be isolated from regulation by law.

Superimposed upon these socio-biological justifications for the natural conception

-
41. There is, however, in liberal theory, a failure to recognize that what goes on in private has a bearing on the ability to participate as an equal person in the public realm. The autonomous actor in the public sphere cannot subsist inside this public realm alone. He (and that is usually what he is) can only enter the public from the security and comfort provided by his intimate "private" surroundings.
 42. O'Donovan, *supra*, note 19 at 5. Also, following the liberal public-private dichotomy the two spheres shape different types of discourse and justice. The one rational and abstract, the other intimate, contextual and concrete. To the extent that womens' roles were concentrated in the home, inside the private realm where the second type of discourse prevailed, they were, by implication, disqualified from the discourse of the public realm. Engaged in the context of the family their interests and standpoint were disparaged as parochial and partial and therefore, unfit for the generalized abstractions which dominate the public.
 43. Frances E. Olsen, "The Myth of State Intervention in the Family" (1985), 18 J. Law Reform 835 at 844.
 44. Carl E. Schneider, "Moral Discourse and the Transformation of American Family Law" (1985), 83 Mich. L. Rev. 1801 at 1858.
 45. See, e.g., Goldstein, Solnit and Freud, *supra*, note 8 at 111.
 46. Goldstein, *supra*, note 33 at 50.

of family privacy is a further rationale supplied by classical liberalism. To the extent that the family is viewed as a single person (whether this is the male head of the nineteenth century or the "perfect unity of human wills" envisioned by traditional communitarianism), legal regulation of family life is inconceivable because of the inviolability of the individual.⁴⁷ Indeed, for the state to intrude upon this "natural" individual would be to violate the most basic principles of individual liberty, subjecting "private" family life to "an external set of standards," enforced against individual family members by the coercive apparatus of the state.⁴⁸ Consequently, as the English Court of Appeal declared in 1919, "each house is [and, by implication, must remain] a domain into which the King's writ does not seek to run and to which his officers do not seek to be admitted."⁴⁹ More recently, a commentary on Ontario's new *Child and Family Services Act* describes the family as "the basic unit of society," with the right "to grow and develop within its own sphere without outside interference and intervention."⁵⁰

The Contractual Family

While the natural family invokes organic conceptions of human society, the contractual family is thoroughly liberal. Rather than viewing the family as a natural entity with which neither the state nor law should interfere for fear they would disrupt its internal harmony, liberal theory envisions family relations in precisely the same contractual framework as the traditional atomistic conception of the public domain or *Gesellschaft*.⁵¹ Thus, family members are conceived as radically separate individuals, and free will is posited as the means by which the family is both brought into existence and terminated. Accordingly, although the family becomes a legitimate domain for legal regulation, such intervention is welcome only to the extent that it is compatible with the abstract will of each contracting party.

While this model can at least roughly account for the relationship between each parent,⁵² it clearly poses considerable difficulties in accounting for the position of children. Some have attempted to address this problem by positing fictional contracts with Rawlsian child-persons.⁵³ More generally, however, children are largely invisible within the contractual family. As a result, although some contemporary discourse equates the liberalization of the family with both the juridical equality of men with

47. See, e.g., John Stuart Mill, *On Liberty*, David Spitz Ed. (New York: Norton, 1975) at 70-86: "Of the Limits to the Authority of Society over the Individual".

48. Schneider, *supra*, note 44 at 1858.

49. *Balfour v. Balfour* [1919], 2 K.B. 571 at 579 (C.A.), *per* Atkin L.J.

50. Douglas W. Phillips, "The Child and Family Services Act: The Mechanics and Roles of Court, Lawyer and Professional" (1985), 45 R.F.L. 229 at 301.

51. See, e.g., Margorie Maguire Shultz, "Contractual Ordering of Marriage: A New Model for State Policy" (1982), 70 Calif. L. Rev. 204.

52. On the other hand, as explained below, there are serious deficiencies in such a separative conception of relationships even among adults. *Infra*, notes 85-128 and accompanying text.

53. See, e.g., David L. Chambers, "Rethinking the Substantive Rules for Custody Disputes in Divorce" (1984), 83 Mich. L. Rev. 477 at 497-98. See also Sheila Schwartz, "Toward a Presumption of Joint Custody" (1984), 18 Fam. L. Q. 225 at 245.

women and of parents with children,⁵⁴ liberal notions of the family suffer from an unfortunate tendency to conceive of children more as the property of their parents than as persons in their own right.

STATE, LAW, AND FAMILY

Implicit in the first notion of family privacy arising from the "natural family" are three assumptions regarding the nature of law and the relationship between the family and the state: first, that the family exists naturally, without reference to law and the state; second, that legal intervention encourages social conflict and undermines the values of community upon which the family depends; and third, that state action necessarily contradicts the idea of autonomy. None of these suppositions can sustain critical analysis.

Private and Public

To begin with, it is impossible to conceptualize the family in isolation from law and the state.⁵⁵ On the contrary, in carving out a domain of human interaction "free" from legal intervention, society necessarily articulates a particular set of norms respecting both the forms of human relationships recognized as families and the substance of those relationships themselves.

While traditional anthropological theory depicts these relationships as biologically determined and therefore purely "natural," critical analysis reveals conventional notions of the family to be projections of highly culturally relative patterns of family life. Specifically, Malinkowski's view of the family as a functionally integrated social formation devoted to the nurturance of children corresponds to one of the major roles that families have served in modern industrial societies.⁵⁶ So too, Tonnies' *Gemeinschaft/Gesellschaft* dichotomy corresponds to a particular form of social life, characteristic of nineteenth and twentieth century Western culture, in which the intimate realm of the "private" family is defined in opposition to the impersonal "public" domain of the state and the market.

In neither case, therefore, can these depictions be viewed as "natural." On the contrary, the contemporary institution of the family, to which these portrayals correspond, is of remarkably recent origin in the history of human societies, dating only from the emergence of the market and the nation state in Western Europe in the seventeenth and eighteenth centuries.⁵⁷ Equally, the concept of "childhood" is, to a

54. See, e.g., David A.J. Richards, "The Individual, the Family, and the Constitution: A Jurisprudential Perspective" (1980), 55 N.Y.U.L. Rev. 1.

55. Frances E. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983), 93 Harv. L. Rev. 1497; Olsen, "Myth of State Intervention," *supra*, note 43; Martha Minow, "Beyond State Intervention: For Baby Jane Doe" (1985), 18 J. Law Reform 933.

56. Collier, Rosaldo and Yanagisako, *supra*, note 26 at 27.

57. Olsen, "Family and Market," *supra*, note 55. See also Mary Ann Glendon, *The New Family and the New Property*, (Toronto: Butterworths, 1981).

considerable extent, socially constructed.⁵⁸ Thus, for example, "adolescence" is largely the creation of modern industrial societies,⁵⁹ in which the family has declined as the major unit of economic production, and a prolonged period of education has replaced early childhood participation in the productive life of the family.⁶⁰

If, therefore, it is impossible to identify the family as a purely natural institution, the "private" family can exist only as a *socially* defined sphere of human interaction. And, thus, as Fran Olsen has so persuasively reasoned,⁶¹ since law and the state *necessarily* define both the form and the boundaries of those relationships that qualify as families, "state intervention" in the "private" family is unavoidable. Instead, the very concept of The Family assumes a particular structure of human relationships, implicitly sanctioned by the state both by its "nonintervention" and by its "intervention."

Thus, for example, despite the documented diversity of actual family structures both throughout human history,⁶² and in contemporary society,⁶³ the conventional notion of the family remains distinctly heterosexual, procreative, nuclear and co-residential. According to Margrit Eichler, "the most famous and most widely used definition of the family" refers to it as

... a social group characterized by common residence, economic cooperation, and reproduction [including] adults of both sexes [maintaining] a socially approved sexual relationship, and one or more children, own or adopted, of the sexually cohabitating adults.⁶⁴

Notwithstanding human rights guarantees against discrimination on the basis of sexual orientation,⁶⁵ the law does not recognize homosexual marriages,⁶⁶ and homosexual relationships are excluded from the operation of provincial family law legisla-

58. See, e.g., Arlene Skolnick, "The Limits of Childhood: Conceptions of Child Development and Social Context" (1975), 39 *Law and Contemporary Problems* 38; Michael P. Roche, "Childhood and its Implications for Children's Rights" (1988), 34 *Loyola L. Rev.* 5. The modern classic remains Philippe Aries, *Centuries of Childhood: A Social History of Family Life*, Robert Baldick Trans. (New York: Vintage, 1962).

59. This is not to say that the adolescence was inexorably determined by the structure of industrial society. Clearly, the forced removal of children from the labour market by child labour laws and compulsory school attendance played a central role. See, e.g., Skolnick, *ibid.* at 63.

60. *Ibid.* at 61-63. See also F. Raymond Marks, "Detours on the Road to Maturity: A View of the Legal Conception of Growing Up and Letting Go" (1975), 39 *Law and Contemporary Problems* 78.

61. Olsen, "Myth of State Intervention," *supra*, note 43 at 844.

62. Collier, Rosaldo and Yanagisako, *supra*, note 26.

63. Eichler, *supra*, note 16 at 1-61.

64. *Ibid.* at 2.

65. See, e.g., *Human Rights Code, 1981*, S.O. 1981, c. 53, s. 1 [as am. S.O. 1986, c. 64, s. 18].

66. See, e.g., *M.J. v. J.T.*, 355 A.2d 204 (N.J. Super. A.D., 1976); *Adams and Sullivan v. Howerton*, 486 Fed. Supp. 1119 (U.S. Dist. Ct., 1980).

tion.⁶⁷ Statutory provisions governing child adoption convey the legal fiction that the child was actually born to the adopting parent.⁶⁸ Only recently were Ontario municipalities prohibited from enacting by-laws limiting the number of unrelated people living together within the same home.⁶⁹ Finally, and of particular relevance to the law of child custody, is the inescapable implication of this definition that a family no longer exists where the parents have separated.⁷⁰

As well as determining the forms of human interaction recognized as families, the state inescapably shapes the character of relationships within the family. Thus, for example, where child abuse and spousal assault have been treated as "private" family matters, and thereby shielded from legal intervention, the state has tacitly condoned hierarchical relationships of patriarchal and parental authority within the family.⁷¹ Likewise, legal intervention in the name of preserving family privacy itself presupposes a particular conception of the appropriate roles within the family. Thus, for the common law of the nineteenth century, family privacy supported patriarchal norms.⁷² Women were prohibited from holding property and from entering into contracts,⁷³ and children were presumed to be the servants of their father alone.⁷⁴ As Olsen recounts:

If the wife were to leave and take the children with her, the courts would ordinarily be expected to grant a habeas corpus writ ordering her to return them to him. For courts to refuse to issue such a writ would be considered state intervention in the family.⁷⁵

While contemporary contractual notions of the private family generally assume the juridical equality of men and women, they still authorize considerable parental authority over children.⁷⁶ Consequently, it is not at all uncommon to see the

67. See, e.g., *Anderson v. Luoma* (1984), 42 R.F.L. (2d) 444 at 448 (B.C.S.C.): "The Family Relations Act does not purport to affect the legal responsibilities which homosexuals may have to each other or to children born to one of them as a result of artificial insemination."

68. *Child and Family Services Act*, S.O. 1984, c. 55, s. 152 [hereinafter CFSA].

69. See, e.g., Mary Gooderham, "Municipal critic assails proposal that would limit family size," *Globe & Mail* (14 February 1989) A4.

70. See *infra*, note 158 and accompanying text.

71. Olsen, "Myth of State Intervention," *supra*, note 43 at 853-54. For an especially lucid analysis of the changing legal response to spousal assault in Canada, see Timothy A.O. Endicott, "The Criminality of Wife Assault" (1987), 46 U.T. Fac. L. Rev. 355. The evolving legal reaction to child abuse is brilliantly documented in M.D.A. Freeman, *The Rights and Wrongs of Children*, (Dover, N.H.: F. Pinter, 1983).

72. Olsen, "Myth of State Intervention," *supra*, note 43 at 849-53. See, e.g., Tonnies, *supra*, note 34 at 39, asserting that "the idea of authority is, within the Gemeinschaft, most adequately represented by fatherhood, or paternity."

73. Susan Maidment, *Child Custody and Divorce: The Law in Social Context*, (London: Croom Helm, 1984) at 4.

74. See, e.g., *King v. DeManneville*, 102 Eng. Rep. 1054 (K.B. 1804); *Ex parte Skinner* (1824), 9 Moore 278; *Re Agar-Ellis*, (1883) 24 Ch. D. 317; *State v. Richardson*, 40 N.H. 272 (1860). See also H.H. Foster and D.J. Freed, "Life with Father" (1978) 11 *Fam. L.Q.* 321.

75. Olsen, "Myth of State Intervention," *supra*, note 43 at 850.

76. *Ibid.* See also Skolnick, *supra*, note 58; and Roche, *supra*, note 58.

expressions "family autonomy" and "parental autonomy" employed interchangeably.⁷⁷ While this slight of hand obscures the implicit moral choices involved in deciding when the state should "intervene" and when it should "respect family privacy," it cannot eliminate the necessity of making that choice. In *Yoder v. Wisconsin*,⁷⁸ for example, a majority of the U.S. Supreme Court found it unnecessary to inquire into the wishes of the children in ruling that the religious freedom of their Amish parents prohibited the state from requiring compulsory education of the children after the eighth grade. In a number of more recent cases,⁷⁹ on the other hand, the same Court has interpreted the constitutional right to privacy to safeguard minors' access to contraceptives and abortion services, notwithstanding parental opposition. While the identification of family autonomy with parental authority defines the latter decisions as "state intrusion" and the former as "nonintervention," it is equally apparent that *Yoder* entails state intervention *in favour of parental authority*.

Finally, the state is deeply implicated in the form of contemporary family relationships by virtue of the background rules and policies that shape the relative capacities of each family member for truly autonomous action.⁸⁰ Government decisions concerning the tax consequences of unpaid domestic labour, the prevention of workplace discrimination, and the regulation of reproduction and child care are central to the position that women occupy within the family. Similarly, government policies regarding the status of children are equally constitutive of their capacity for autonomous action with respect to the family. As Olsen explains:

A child's economic dependence on her [or his] parents reinforces and increases the parent's power over the child. Although young children might not be capable of independence, as children grow older their dependence is increasingly attributable to state regulations.⁸¹

Thus, for example, while labour legislation restricting the hours and categories of child employment is of obvious benefit to children, such regulations nevertheless make it difficult for children to achieve economic independence.⁸² Furthermore, as Olsen observes: "State laws not only limit a child's opportunity for paid employment, they also require the child to attend school — work for which she [or he] receives no pay."⁸³ Finally,

77. See, e.g., Goldstein, *supra*, note 33 at 5.

78. 406 U.S. 205 (1972), (Justice Douglas dissenting) [hereinafter *Yoder*].

79. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Carey v. Population Services International*, 431 U.S. 678 (1977); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Planned Parenthood Association v. Ashcroft*, 462 U.S. 476 (1983). See also *Gillick v. West Norfolk and Wisbech Area Health Authority*, [1985] 3 All E.R. 402 (H.L.).

80. Olsen, "Myth of State Intervention," *supra*, note 43 at 848.

81. *Ibid.* at 851–52.

82. *Ibid.* at 852.

83. *Ibid.*

... when a state pays welfare benefits for a child or orders one parent to pay support for a child, the money does not go to the child herself [or himself], but to a custodian, usually the other parent. This maintains the child's economic dependency on her [or his] custodian.⁸⁴

Indeed, student assistance programs that refuse financial support to applicants whose parents earn more than a stated amount prolong this condition of dependency well beyond teenhood.

In each of these respects, therefore, by defining those social formations recognized as families, by determining when and when not to "intervene," and by establishing the background rules and policies by which relative power within the family is shaped, the state cannot help but "intervene" in the "private" family domain. In fact, the dichotomies of intervention/nonintervention and private/public are themselves incoherent. As a society, we collectively cannot escape the necessity of making choices.

Law and Community

Choices, of course, are implicit in both communitarian and liberal-contractarian conceptions of family privacy. In the first, the natural family is viewed as a refuge of altruism, love and community, in a society of self-interest, alienation and isolation: a "haven in a heartless world."⁸⁵ Who would wish upon this vision of the private family the Rule of Law that divides and separates atomistic individuals in the social world?

The image of the natural family has a (justifiably) powerful appeal in contemporary society and requires sensitive treatment by those who wish to challenge the dichotomy upon which it is based.⁸⁶ It is not enough simply to "demystify" the private family by exposing the manner in which it is itself a product of society. Nor is it sufficient to point to the all-too-frequent instances in which spousal and child abuse and, more generally, male domination of women and parental oppression of children call the idealized vision of the affectionate family into question. By those whose experience does not mirror these patterns, or for whom current structures are not felt as oppressive,⁸⁷ these accounts are all too readily dismissed as pathological.⁸⁸ For

84. *Ibid.*

85. *Lasch, supra*, note 32.

86. We bracket the word "justifiably" to indicate that, while we support many of the animating values that inform the traditional image, we question their incarnation within this traditional form.

87. It is important that we not succumb to notions of "false consciousness" to characterize those whose conception of social reality does not accord with our own. My conception of your oppression is not in fact *your* oppression unless you *feel* it as your oppression. Following Nedelsky, we use the word "feel" here rather than "perceived" to indicate that people may be wrong in their perceptions, but not in their feelings. See Nedelsky, *supra*, note 18 at 17-20. While I may offer you my (mere) perception that you may be oppressed, that you might re-examine your perceptions to discover your true feelings, I cannot discount your feelings. When I do, I become your oppressor.

88. Perceiving much male privilege as "natural" and/or failing to even appreciate the existence of more subtle forms of male power (we are thinking of studies in which men feel that a woman has "dominated" a conversation where she speaks more than a third of the time), it is especially easy for

many in our society, albeit undoubtedly for more men than women, and for more adults than children, family life can indeed represent a sanctuary – from the workplace,⁸⁹ from school, from government agencies, from traffic and public transportation, from shopping malls and supermarkets. The private/public dichotomy which sustains an image of the natural family may be incoherent, but it is not an illusion.

To challenge traditional communitarian notions of the private family we must also develop an alternative vision of law. In particular, we need to reconceive legal rights and law in a manner that is both reflective and constitutive rather than destructive of community. In this project, moreover, lies the possibility of developing “richer notions of rights”⁹⁰ by which we may redefine not only familial relationships, but also relationships in the “public” spheres of the marketplace and the state.⁹¹ So too, we require a different conception of autonomy: one which, while respecting the values of freedom and self-determination is mindful of the socially constituted and relational nature of the self.

This task has been effectively begun by Martha Minow.⁹² In contrast to conventional rights theories, she adopts as the starting point for thinking about rights concrete *relationships* among social beings, rather than entitlements of abstract *individuals* in a state of assumed isolation.⁹³ As Minow explains:

According to this view, legal rights are interdependent and mutually defining. They arise in the context of relationships among people who are themselves interdependent and mutually defining. In this sense, every right and every freedom is no more than a claim limited by the possible claims of others. Rights, in fact, could be understood as simply the articulation of legal consequences for particular patterns of human and institutional relationships.⁹⁴

men to dismiss extreme forms of physical abuse in this fashion. Yet, for many women too, nurtured on a culture of caring and often attracted by ideas of family and motherhood, the affectionate family is a compelling vision. Even among children, the most powerless in the contemporary family, family life is by no means invariably experienced as oppressive.

89. Recognizing, of course, that for most women the home is also the workplace – even when they also work outside the home.

90. Martha Minow, “Rights for the Next Generation: A Feminist Approach to Children’s Rights” (1986), 9 Harv. Women’s L.J. 1 at 15.

91. For an especially stimulating application of this thinking to an analysis of the contemporary bureaucratic state, see Nedelsky, *supra*, note 18.

92. Martha Minow, “‘Forming Underneath Everything That Grows:’ Toward a History of Family Law,” [1985] Wisc. L. Rev. 819; Minow, “Rights for the Next Generation,” *supra*, note 91; Martha Minow, “Interpreting Rights: An Essay for Robert Cover” (1987), 96 Yale L.J. 1860.

93. This, of course, has been the approach of modern liberal theory, beginning with Thomas Hobbes and John Locke. See Thomas Hobbes, *Leviathan* (New York: Collier, 1962); John Locke, *Two Treatises of Government*, Everyman’s Library edn. (London: J.M. Dent & Sons, 1975). The modern classic is undoubtedly John Rawls, *A Theory of Justice*, (Cambridge, Mass.: Harvard University Press, 1971). For a more recent account, see Ernest J. Weinrib, “Law as a Kantian Idea of Reason” (1987), 87 Colum. L. Rev. 472.

94. Minow, “Interpreting Rights,” *supra*, note 92 at 1884.

Of particular importance to an analysis of custody law, this relational approach admits the possibility of specifying children's rights – a notion that is inadequately accommodated by liberal rights theories in which abstract rights inhere only in fully "responsible" and "autonomous" adults. Since every assertion of individual rights "expresses relationships and interconnections at the very moment that the individual asserts his or her autonomy ... children's rights are no more problematic than adult's rights because all rights claims imply relationships among members of a community."⁹⁵

Furthermore, since legal rights are themselves both constituted by and constitutive of community, the regulation of familial relationships through this reconceived "rule of law" need not contradict the animating values of community which inspire conventional notions of the natural family. While traditional rights theories establish barriers between alienated individuals, assertions of relationally conceived rights translate, but do not initiate conflict.⁹⁶ Citing *Goss v. Lopez*,⁹⁷ for example, where a majority of the U.S. Supreme Court held that the constitutional entitlement to due process includes the right of secondary school students to an informal hearing before expulsion, Minow observes that "conflict was present long before anyone asserted in court that students had rights."⁹⁸ In fact, the appeal to law served not as a stimulus to conflict but as a means of resolving a dispute already in existence.

Finally, instead of undermining social cohesion, the appeal to rights discourse can actually "reconfirm" community.⁹⁹ Substantively, although every concrete rights claim is inevitably highly contextual, the very concept of a right implies the ability to universalize its meaning within the community as a whole. In this respect, the declaration of one's own rights implies a recognition of the equal rights of others.¹⁰⁰ Similarly, on a procedural level, resort to the language of rights implies participation in the process through which the collective choices of the community shape our individual existence within society at the same time that our individual existence helps shape the community.

95. *Ibid.* at 1888.

96. *Ibid.* at 1871.

97. 419 U.S. 565 (1975).

98. Minow, "Interpreting Rights," *supra*, note 92 at 1872.

99. *Ibid.* at 1873.

100. Recognizing the value of equality is among the most crowning theoretical achievements of liberal rights theories and, we believe, must not be abandoned in a shift toward a more relational notion of rights. However, a relational/contextual approach can provide a richer conception of equality than the liberal, similarly situated test. Similarly situated assumes a stance of homogeneity, typically where one point of view is posited as the norm against which all else is measured and labelled different. On this view all that is the same is equal and all that is different is less than the norm (which is usually the male standard). Here, difference is dichotomized rather than treated as a continuum where the plurality and diversity of differences are attended to. A relational approach to equality recognizes diversity and interconnections and constructs a heterogeneous view of equality. For a sophisticated elaboration of this view of equality and difference see, e.g., Zillah R. Eisenstein, *The Female Body and the Law*, (Berkeley: University of California Press, 1988). See also Martha Minow, "Forward: Justice Engendered" (1987), 101 Harv. L. Rev. 10.

Community and Autonomy

On the other hand, as classical liberalism has rightly emphasized, there is a danger in any theory that takes social relations as the starting point for thinking about rights. While conventional notions of the Rule of Law have undermined values of community, traditional communitarianism has been equally indifferent to values of individuality and autonomy.¹⁰¹ Tonnies' theory of *Gemeinschaft*, for example, abjures all notions of individuality by viewing the community as a "perfect unity of human wills."

Minow herself, while clearly recognizing the possibility of conflict between the individual and the community, appears similarly unable to resolve this tension in a manner that guarantees respect for individual autonomy. Conceiving of rights claims as demands on the community for "equality of attention," she suggests that the claimant "acknowledges ... membership in the larger group, her participation in its traditions, and her observation of its forms" and implicitly agrees "to abide by the community's response."¹⁰² As a result, the community remains the final arbiter of the claimant's right, without any basis (other than "equality of attention") for grounding its response.

The potential coercion of the individual by the collective has been a powerful rationale for the liberal enterprise of drawing fixed boundaries between the individual and the state. In the context of the family, this fear underlies arguments for family privacy on the grounds that legal regulation would subject the family to "an external set of standards enforced by might."¹⁰³ So too does it inform contractarian conceptions of the family as a specific social organization based upon the freely-willed consent of perfectly equal and rational rights-bearing selves. Who would impose upon this notion of the private family state-imposed norms and forms of relationship dictated by the larger collectivity?

As with communitarian notions of the natural family, the values of individual liberty and self-determination informing liberal-contractarian conceptions of the family also have a (justifiably) powerful appeal in contemporary society¹⁰⁴ and require sensitive treatment by those who would challenge the individualistic rights framework within which they are traditionally understood. Here too – as with the communitarian belief that legal regulation would destroy the intimate character of family life – it is not enough merely to assert the conceptual impossibility of "non-intervention" in the "private" sphere of the family. Nor is it sufficient to expose the many ways in which the private/public dichotomy masks the manner in which societal choices both define the forms of human relationships recognized as families *and* shape the substance of those relationships. In addition, as Jennifer Nedelsky has so

101. See, e.g., Alasdair MacIntyre, *After Virtue*, (Notre Dame: University of Notre Dame Press, 1981); Michael Sandel, "Justice and the Good," in Sandel, ed., *Liberalism and its Critics*, (New York: New York University Press, 1984).

102. Minow, "Interpreting Rights," *supra*, note 92 at 1874, 1879.

103. Schneider, *supra*, note 44 at 1858.

104. On the bracketed use of the word "justifiably," see *supra*, note 86.

keenly recognized, we must also develop an alternative conception of autonomy.¹⁰⁵ This begins with the recognition that "a real and enduring tension between the individual and the collective" is inherent in the human condition.¹⁰⁶ In contrast to classical liberalism, however, which only acknowledges this tension in order to assume it away (by the abstraction of a social contract through which isolated individuals enter into a "society" that never really exists as such), such a reconception recognizes explicitly that

[w]e come into being in a social context that is literally constitutive of us. Some of our most essential characteristics, such as our capacity for language and the conceptual framework through which we see the world, are not made by us, but are given to us (or developed in us) through our interactions with others.¹⁰⁷

As a result, Nedelsky explains: "The collective is not simply a potential threat to individuals, but constitutive of them, and thus is a source of their autonomy as well as a danger to it."¹⁰⁸ The problem in any given circumstance, of course, is how to combine this appreciation of "the constitutiveness of social relations" with the enduring values of liberty and self-determination that we have inherited from liberal theory.¹⁰⁹

Feminism offers invaluable insights for developing alternative notions of autonomy. Women's lived experience of definition not by and for themselves, but through their relations with others (as someone's wife or mother), makes feminists acutely aware of "the centrality of relationships in constituting the self."¹¹⁰ On the other hand, for women, this experience has traditionally been one of abnegation rather than realization of self through others. Consequently, as Nedelsky explains:

In developing such concepts, feminists have an advantage in avoiding one of the pitfalls of challenges to liberal individualism: women's experience of relationships as oppressive as well as essential has the virtue of making us less likely to be romantic about the virtues of community as such.¹¹¹

Of particular importance to the manner in which we interpret the relationship between the family and the state are two features of the concept of autonomy developed by Nedelsky. First, she maintains, while autonomy is a capacity, it is a capacity that is intimately related to "the feeling or experience of being autonomous."¹¹² Crucially, this approach "defines as authoritative the voices of those whose autonomy is at issue."¹¹³ Second, autonomy is not an abstract faculty that one may simply assume

105. Nedelsky, *supra*, note 18 at 1.

106. *Ibid.* at 15.

107. *Ibid.* at 3.

108. *Ibid.*

109. *Ibid.*

110. *Ibid.*

111. *Ibid.* at 4, n. 9.

112. *Ibid.* at 18.

113. *Ibid.* at 19.

about human beings – or at least about all persons beyond an arbitrary “age of majority.” On the contrary, persons develop and sustain the capacity for autonomy through their relationships with others.¹¹⁴ As Nedelsky observes:

If we ask ourselves what actually enables people to be autonomous, the answer is not isolation, but relationships – with parents, teachers, friends, loved ones – that provide the support and guidance necessary for the development and experience of autonomy.¹¹⁵

Nevertheless, since these relationships have the potential either to nourish or to diminish autonomy,¹¹⁶ state action is essential to cultivate and to preserve the structures of relationships in which people experience the fullest autonomy possible.

First, the state is central to the process of developing in human beings their capacity for self-determination (consider, for example, the role of education). Second, law is essential to prevent violations of autonomy by others. In each respect, therefore, it is apparent that state action need not contradict the idea of autonomy, but may instead be necessary for its very realization.

RESOLVING FAMILY DISPUTES

The alternative conceptions of law and autonomy developed in the previous section have two implications for the resolution of intra-familial disputes. First, in contrast to traditional communitarianism, intra-familial disputes may be subject to legal regulation without contradicting the very existence of the family. Second, in contrast to liberal-contractualism, the manner of this regulation need not correspond to traditional modes of adjudication in which the respective claims of isolated individuals are separated and ranked. Instead, as recent feminist scholarship has explained,¹¹⁷ it

114. *Ibid.* at 4.

115. *Ibid.* at 6. In this respect, she suggests, “the most promising model, symbol, or metaphor for autonomy is not [as in liberal theory] property, but childrearing.” *Ibid.*

116. Again, the childrearing model is illustrative: “parents are both a source of a child’s autonomy and a potential threat to it.” *Ibid.* at 15.

117. See, e.g., Carol Gilligan, *In a Different Voice: Psychological Theory and Womens’ Development*, (Cambridge, Mass., 1982). See also Nel Noddings, *Caring: A Feminist Approach to Ethics and Moral Education*, (Berkeley, Calif., 1984); Sheila Mullett, “Shifting Perspective: a New Approach to Ethics,” in Lorraine Code, Sheila Mullett and Christine Overall, eds., *Feminist Perspectives: Philosophical Essays on Method and Morals*, (Toronto, 1988); Virginia Held, “Non-Contractual Society: A Feminist View” in Marsha Hanen and Kai Nielsen, eds., *Science, Morality and Feminist Theory*, (Calgary, 1987). While in much feminist writing the “justice” and “care” approaches are said to represent two distinctive forms attributed to gender differences, this article leaves open the question of etiology. Carol Gilligan uses the terms “justice” and “care” to differentiate the two ethical and legal approaches. We prefer to speak of the “liberal” or “separative” and “relational” approaches, recognizing that the concept “justice” captures a value or ideal that we wish to preserve, though not in its liberal trappings. It is possible, therefore, to posit a concept of relational justice which resembles more closely Gilligan’s care approach. On the other hand, the ethic of care begins from a conception of the self which is relational and interdependent in contrast to the liberal atomistic and separative self and generates a method of dispute resolution from this perspective of connection and interdependence. While one value such an approach generates is that of care and caring, the values of non-subordination and respect for difference are also likely to flow from a relational-contextual approach. Therefore the approach is

is possible to develop alternative approaches to dispute-settlement, emphasizing relationships between persons rather than claims over things. Drawing upon the assurance that relational alternatives to adversarial and separative methods of adjudication do indeed exist, we will argue that a relational approach to dispute resolution is particularly apt in the context of the family.

Central to the relational approach is a conception of relationships "where awareness of the connection between people gives rise to a recognition of responsibility for one another, a perception of the need for a response."¹¹⁸ This ethic sees "actors in [a] dilemma arrayed not, as opponents in a contest of [individual] rights, but as members of a network of relationships on whose continuation they all depend."¹¹⁹ The method of conflict resolution suggested by this approach depends not on a hierarchical ordering of claims, but on attending to context and the needs of all parties involved. Accordingly, moral problems arise from conflicting responsibilities and require for their resolution a mode of thinking that is contextual and narrative rather than formal and abstract.¹²⁰

The separative model of moral and legal reasoning, on the other hand, "values hierarchical thinking based on the logic of reasoning from abstract, universal principles."¹²¹ As a system of logic and law, mediated impersonally, conflict is thought to be resolved through logical deduction where each element of a dispute is viewed as discrete and separate. This model of moral and legal dispute resolution is at odds with a relational approach which envisions the world not through a system of rules but through human connection.

For Gilligan, the contrast between separative and relational ethics lies in differing conceptions of the self – a contrast "between a self defined through separation and a self delineated through connection."¹²² Furthermore, as she notes, these two ethics yield divergent resolutions of a conflict between responsibilities to others and responsibility to self. The separative approach begins with a responsibility to the self and then considers the extent to which one is responsible to others as well: "Proceeding from a premise of separation but recognizing that we have to live with other people, [it] seeks rules to limit interference and thus to minimize hurt."¹²³ Conversely, to analyze conflicting responsibilities from the standpoint of relation, one begins from the premise of connection. Instead of applying an abstract rule to yield a principled or, at least, determinative outcome, one proceeds contextually

not exclusively about care, but about relations. Furthermore, while we do find persuasive the idea that certain values, characteristics and behavior are gendered (that is, that differences are a product of social construction, not of biology), we are aware that such a view is problematic. The risk is in perpetuating stereotypes that prevent us from seeing the characteristics as characteristics without their gendered context.

118. Gilligan, *ibid.* at 30.

119. *Ibid.*

120. *Ibid.* at 19.

121. Carrie Menkel-Meadow, "Portia in a Different Voice: Speculations on a Women's Lawyering Process" (1985), 1 Berkeley Women's L.J. 39 at 45.

122. Gilligan, *supra*, note 117 at 29.

123. *Ibid.* at 37.

"indicating how choice would be affected by variation in character and circumstance."¹²⁴ Thus, while the separative approach conceptualizes responsibility as limitation and not an extension of action, relational responsibility entails a positive act of recognizing and responding to the needs of others rather than the restraint of aggression.

An application of the two ethics described above to the legal system and to the process of legal decision-making yields significantly different approaches and outcomes. The basic structure of the current form of legal-decision making is adversarial in nature. The judicial process comes into play over a clash of abstract, individual rights and the legal system claims to decide between these clashing rights through an application of abstract and universal rules or standards. Thus, in the ideal situation, the matching of facts with rules yields a decision of objective certainty which can be repeated for any similar case. However, as Ann Scales notes, in the "real world" the means become ends and the abstract rules displace and even distort the real facts of the situation.¹²⁵ Furthermore, by privileging the values of hierarchy, competition and separation, the current adversarial model works through a process of negation of the other where, in any legal dispute, there is always a winner and a loser. Thus, in making distinctions, the law divides rather than integrates.¹²⁶

A relational approach to dispute-settlement, on the other hand, looks for a solution that is consistent with the context of the dispute. In contrast with the abstracting and hierarchical ordering of claims employed by the separative model, the relational approach "tries to account for all the parties' needs, and searches for a way to find a solution that satisfies the needs of both."¹²⁷ To do this, the context of any particular dispute must be expanded before attending to its resolution. The adversarial nature of the process must be diminished and the primary procedural function of the legal system becomes the facilitation of dialogue to encourage the parties to reach a decision.

Moreover, at the same time that we encourage direct communication between the parties as a means of conflict resolution, we become less concerned about the creation of a precedent of universal applicability and more attentive to the context in which the dispute is embedded.¹²⁸ In the context of custody, this would yield a case-by-case

124. *Ibid.* at 38.

125. Ann Scales, "The Emergence of Feminist Jurisprudence: An Essay" (1986), 95 Yale L.J. 1373 at 1377. Similarly, Carrie Menkel-Meadow notes that "... equity begins to develop its own harsh rules of law and universalistic regulations applied to discretionary decisions, undermining the flexibility that discretion is supposed to protect." Menkel-Meadow, *supra*, note 121 at 50.

126. This legal model "assumes competition over the same limited item and assumes that success is measured by maximizing individual gain." Menkel-Meadow, *ibid.* at 51. In the context of custody, the item is the child or children and sole custody is the maximum form of individual gain.

127. *Ibid.* at 51. Speaking of the connection between law and the relational approach, Ann Scales writes that "relational reasoning is law's soul, that law's duty is to enhance, rather than to ignore, the rich diversity of life. Yet this purpose is not obvious, it is obscured by the myth of objectivity. . . . Feminism inverts the primacy of rules over facts. Feminist method stresses that mechanisms of law — language, rules and categories — are all merely means for economy in thought and communication." Scales, *supra*, note 125 at 1387–88.

128. See Menkel-Meadow, *supra*, note 121 at 58.

approach to the resolution of disputes, without any overriding rule or presumption. Furthermore, by expanding the context of the dispute to allow participation by all whose interests might be affected, law must look to the complex web of family relationships in facilitating a particular outcome.

The Basic Structure of Contemporary Custody Law

The most conspicuous feature of contemporary custody law is its central axiom that all disputes concerning access and child custody are to be determined solely on the basis of "the best interests of the child."¹²⁹ This section examines this welfare principle alternatively from the perspectives of intra-familial dispute-settlement and child protection.

DISPUTE-SETTLEMENT AND THE WELFARE PRINCIPLE

As a standard by which to resolve specific disputes over particular aspects of child custody, the best interests of the child test is particularly curious. As numerous observers have remarked, custody determinations under the welfare principle differ markedly from the paradigmatic form of private adjudication.¹³⁰

First, while the focus of traditional adjudication is uniformly retrospective, evaluating *past* acts and events against judicially elaborated norms to govern the specific relationship giving rise to the dispute, custody decisions based on the best interests of the child are implicitly forward-looking, based on the court's assessment as to the optimal placement to promote the *future* welfare of the child.¹³¹ In this respect, moreover, while private adjudication is characteristically non-instrumental in character, professing to "do justice" between the parties rather than to pursue some extrinsic policy goal, contemporary custody litigation is explicitly dedicated toward the specific objective of enhancing child welfare.

Second, because contemporary custody law endeavours to promote the future welfare of the child, the court must embark upon a wide-ranging inquiry into the merits of each possible custody arrangement and the relative advantages and disadvantages that each parent offers to the child. Thus, as Lon Fuller has remarked, while adjudication typically entails "act-oriented" determinations, custody litigation under the best interests standard involves "person-oriented" determinations.¹³² Joan Wexler describes the distinction admirably as follows:

In most other litigation, the result will depend upon the court's determination that some event did or did not take place at an earlier time. Aside from possibly bearing on credibility, the litigants' personality, priorities, lifestyle, financial resources, emotional stability, and other personal attributes have no relevance to the outcome. In custody

129. CLRA, s. 24(1); DA (1985), s. 16(8).

130. See, e.g. Mnookin, *supra*, note 1 at 249-55.

131. *Ibid.* at 251-52.

132. Lon Fuller, "Interaction Between Law and Its Social Context," cited in *ibid.* at 250.

litigation, however – at least under the best interests [test] – those very factors will determine the result in large measure, with the court making a judgment as to whether the child is likely to be “better off” with one parent than with the other.¹³³

Thus, custody determinations based on the child welfare principle make central precisely those issues excluded from consideration in most private adjudication.

Consequently, while the adversary system traditionally leaves to the parties themselves the right “to prove their entitlement to the remedy requested,”¹³⁴ the conduct of litigation under contemporary custody law assigns far greater authority to the court to determine the course of the trial. Thus, for example, the Ontario Court of Appeal stated in *Gordon v. Gordon* that:

A custody case, where the best interest of the child is the only issue, is not the same as ordinary litigation and requires, in our view, that the person conducting the hearing take a more active role than he ordinarily would take in the conduct of a trial.¹³⁵

Moreover, provincial legislation contemplates the appointment of an independent expert “to assess and report to the court on the needs of the child and the ability and willingness of the parties ... to satisfy the needs of the child.”¹³⁶

Fourth, the instrumental and “person-oriented” character of contemporary custody determinations confers enormous discretion on the presiding judge to dictate the family’s post-separation custody arrangements according to his or her (but overwhelmingly his) own conception of what is in the best interests of the individual child and of children generally. While considerable discretion is not unknown in other areas of private law, such a widespread grant of discretionary power is virtually unheard of.

Finally, the tremendous breadth of judicial discretion under the best interests standard has significant implications for both the role of precedent and the scope of appellate review under contemporary custody law.¹³⁷ While these mechanisms generally serve to confine and structure discretion, their influence is narrowly circumscribed in the context of contemporary custody litigation. Because the child welfare principle entails “person-oriented” determinations, previous decisions merely suggest specific factors that may be considered.¹³⁸ In the final analysis, the courts are quick to explain, each case must be decided on its own facts. For the very

133. Joan Wexler, “Rethinking the Modification of Child Custody Decrees” (1985), 94 Yale L.J. 757 at 762.

134. Rosalie Abella, “Procedural Aspects of Arrangements for Children Upon Divorce in Canada” (1983), 61 Can. Bar Rev. 443 at 451.

135. (1980), 23 R.F.L. (2d) 266 at 271 (Ont. C.A.).

136. CLRA, s. 30(1). Furthermore, the court may require the parents and the child “to attend for assessment by the person appointed by the order.” CLRA, s. 30(5). The Act contains the ominous warning that in the event of such a refusal, “the court may draw such inferences in respect of the ability and willingness of any person to satisfy the needs of the child as the court considers appropriate.” CLRA, s. 30(6).

137. Mnookin, *supra*, note 1 at 253–54.

138. See, e.g., Catton, *supra*, note 4 at 341.

same reason, moreover, appellate courts are extremely loathe to reverse a trial decision where the judge has the advantage of seeing and assessing the parties. In *Talsky v. Talsky*,¹³⁹ for example, the Supreme Court of Canada approved the following standard of appellate review, enunciated a quarter century earlier by the Privy Council:

[Since] the question of custody of an infant is a matter which peculiarly lies within the discretion of the learned judge who hears the case and has the opportunity generally denied to an appellate tribunal of seeing the parties and investigating the infant's circumstances ... his decision should not be disturbed unless he has clearly acted on some wrong principle or disregarded material evidence.¹⁴⁰

What is more, so long as the trial decision is careful to connect each argument for the specific outcome to an interpretation of the child's welfare, it is difficult to imagine how any judge could "act on some wrong principle", since as Susan Maidment points out: "All matters are relevant if the judge thinks they are."¹⁴¹

CHILD PROTECTION AND THE WELFARE PRINCIPLE

The striking contrast between the traditional adjudicative form and the basic structure of contemporary custody law suggests that the best interests test is informed more by considerations of child protection than by notions of intra-familial dispute-settlement. Indeed, the child protection rationale for the primacy of the best interests standard has been asserted most forcefully by Joseph Goldstein, Albert Solnit and Anna Freud in their highly influential book *Beyond the Best Interests of the Child*.¹⁴²

For Goldstein et. al., maximum child welfare is generally achieved by the initial placement of children with their natural parents,¹⁴³ and by legal recognition of the liberty rights of all parents "to raise their children as they see fit, free of government intrusion, except in cases of neglect and abandonment."¹⁴⁴ Drawing on Freudian psychoanalytic theory, they contend that this policy protects "the intricate developmental processes of childhood"¹⁴⁵ by securing for each child "direct, intimate, and continuous care by the adults who are personally committed to assume such responsibility."¹⁴⁶

According to this perspective, however, the circumstances upon which placement with the natural or adoptive parents was initially justified no longer hold whenever separated parents seek the assistance of a court to sort out their respective rights and

139. [1976] 2 S.C.R. 292.

140. *McKee v. McKee*, [1951] 1 All E.R. 942 at 945 (P.C.), per Lord Simonds.

141. Maidment, *supra*, note 73 at 57.

142. Goldstein, Solnit and Freud, *supra*, note 8.

143. *Ibid.* at 6.

144. *Ibid.* at 7.

145. Goldstein, *supra*, note 33 at 51.

146. Goldstein, Solnit and Freud, *supra*, note 8 at 3.

obligations regarding the custody of a child. Since successful child development requires children to perceive parents as "omniscient and all-powerful,"¹⁴⁷ the display of ordinary human fallibility inherent in their assent to the higher authority of the court and the law shatters "the protective shell of the family,"¹⁴⁸ and places the child at risk of emotional harm.

While Goldstein et. al. are nowhere clear as to the specific likelihood or severity of such emotional harm,¹⁴⁹ nor for that matter in the conviction that parental inability to agree upon post-separation child custody arrangements itself confirms that the child is in need of protection, the latter conclusion is implicit in the manner in which they understand the custody decision. First, as Goldstein insists, when the parents "fail to find their own way of resolving their disagreements about custody, [they] in effect, temporarily give up an important part of their autonomy."¹⁵⁰ Second, once this "justification for state intervention" is established,¹⁵¹ the interests of the child should be the "paramount consideration."¹⁵² In these two stages, therefore, custody determinations adopt an identical sequence to that of the child protection hearing – except that in the former case, the very presence of the parents before the court is taken as conclusive evidence that the child is in need of protection.

Where custody law is informed primarily by principles of child protection, the custody decision necessarily involves the imposition of extrinsic values upon the individual family before the court. On the other hand, unlike specific child protection legislation, this process is not limited to the standards of minimally acceptable methods of parenting, nor subject to explicit procedural safeguards designed to protect family autonomy.¹⁵³ Thus, the best interests test permits considerable scope for the presiding court to impose an alien set of norms upon the family and its individual members.

For Goldstein, Solnit and Freud, these norms have a recognizably communitarian character. Children are categorically "incomplete beings who are not fully competent to determine and safeguard their own interests."¹⁵⁴ Consequently, recognition of their voice in the custody decision is inconceivable. On the contrary, they are uniformly "at risk, dependent,"¹⁵⁵ and in need of "unbroken continuity of affectionate and stimulating relationships with an adult"¹⁵⁶ whose authority must be

147. Goldstein, *supra*, note 33 at 50.

148. *Ibid.* at 49.

149. According to provincial child protection legislation, a declaration that a child is "in need of protection" because of existing or impending emotional harm requires that the emotional harm be "demonstrated by severe anxiety, depression, withdrawal, or self-destructive or aggressive behaviour." CFSA, ss. 37(2)(f),(g). Furthermore, the courts have imposed an especially onerous burden of proof on those who would interfere with family autonomy by seeking such a declaration. See, e.g., *Re Chrysler* (1978), 5 R.F.L. (2d) 50 at 58 (Ont. Prov. Ct.).

150. Goldstein, *supra*, note 33 at 51.

151. *Ibid.* at 49.

152. Goldstein, Solnit and Freud, *supra*, note 8 at 105.

153. For a useful summary of these principles, see Phillips, *supra*, note 50.

154. Goldstein, Solnit and Freud, *supra*, note 8 at 3.

155. Goldstein, *supra*, note 33 at 49.

156. Goldstein, Solnit and Freud, *supra*, note 8 at 6.

decisive if the child is to have "confidence in [the] parent's power to shield [the child] from threats from the outside."¹⁵⁷ Since this protective realm of the family is shattered where parents call upon the courts to decide contested aspects of post-separation custody arrangements, explains Goldstein, "the goal of intervention must be to ... recreate a family for the child as quickly as possible."¹⁵⁸

Finally, the authors' conception of the family as a sphere of affective relationships separate from legal regulation suggests narrow restrictions on acceptable arrangements for post-separation child custody.¹⁵⁹ Since, on this account, the regulation of family relationships by law would both undermine the requirements of proper child development¹⁶⁰ and subject family members to "the coercive force of the state,"¹⁶¹ Goldstein et. al. are implacably opposed to the continued jurisdiction of the courts to vary a previous custody order,¹⁶² and above all to any post-separation custody arrangement in which parents and/or children obtain legally enforceable rights – either by court order or through voluntary agreements entered into by the parents themselves.¹⁶³ In each case, argues Goldstein:

... the court, by directing [the child] to act against the express wishes of the custodial parent, casts doubt on that parent's authority and capacity to parent. It damages, particularly for the younger child, his [or her] confidence in his [or her] parent's power to shield him [or her] from threats from the outside. It invites the older child to manipulate his [or her] parents by invoking the higher authority of the court rather than to learn to work things out with the custodial parent.¹⁶⁴

Instead, therefore, whenever the courts are called upon to resolve a specific custody dispute, Goldstein et. al. advise orders for exclusive custody to one parent, thereby depriving the other of all legally enforceable rights with respect to any aspect of the custody of the child.¹⁶⁵ Although not opposed to visitation by and consultation with the non-custodial parent, the authors conclude that it is for custodial parents themselves, and not for the law, to arrange any sharing of physical or legal custody.¹⁶⁶

The Contours of Canadian Custody Determinations

While Canadian custody law enshrines the welfare of the child as the sole consideration in all custody determinations, neither the courts nor the legislatures have accepted wholesale the psychological theories of child development upon which

157. Goldstein, *supra*, note 33 at 53.

158. *Ibid.* at 49.

159. Goldstein, Solnit and Freud, *supra*, note 8 at 6.

160. Goldstein, *supra*, note 33 at 48.

161. *Ibid.* at 48.

162. Goldstein, Solnit and Freud, *supra*, note 8 at 6.

163. Goldstein, *supra*, note 33 at 52–55.

164. *Ibid.* at 53.

165. Goldstein, Solnit and Freud, *supra*, note 8 at 6–7.

166. Goldstein, *supra*, note 33 at 52–53.

the best interests test appears to be based. Thus, for example, regardless of the actual custody order made by the court, the law almost always recognizes the noncustodial parent's "residual rights" of access and guardianship.¹⁶⁷ So too, the courts retain continuing jurisdiction to vary a previous custody order where "there has been a material change in circumstances" in the intervening period.¹⁶⁸ Finally, the judiciary has been willing to attach legal significance to the custody provisions of separation agreements, interpreting these arrangements to accord each parent legally enforceable rights with respect to the custody of the child.¹⁶⁹

Nevertheless, it would be a mistake to underestimate the extent to which child psychology and traditional communitarian notions of family privacy influence the manner in which Canadian law addresses specific custody disputes. In *Frame v. Smith*,¹⁷⁰ for example, where the custodial mother had deliberately and consistently impeded access by the non-custodial father (as stipulated in the original court order), the Supreme Court of Canada embraced a traditional conception of the "private family" by dismissing the father's claim for tort damages on the grounds of "the desirability of provoking suits within the family circle."¹⁷¹

More generally, notwithstanding their affirmation of the residual rights of non-custodial parents, Canadian courts typically interpret the best interests of the child to require an order of sole custody to one parent, usually with liberal access to the other. In this respect, it is appropriate to speak of a sole custody presumption as guiding current Canadian custody determinations. So too, the courts have increasingly turned to the theories of Goldstein, Solnit and Freud to guide their selection of the sole custodial parent. This section examines the judicial rationale for this presumption of

167. See, e.g., *Doiron v. Doiron* (1978), 1 F.L.R. 214 at 215 (P.E.I. S.C. Fam. Div.). For purposes of clarity, we define access as the "physical" component of these rights (regarding physical contact with the child), and guardianship as the "legal" aspect of these rights (involving rights of participation in decisions concerning the upbringing of the child).

168. CLRA, ss. 29, 20(7). Similar wording appears in s. 175 of the DA (1985), requiring "a change in the condition, means, needs or other circumstances of the child ... since the making of the custody order or the last variation order."

169. See, e.g., *Crawford v. Crawford* (1985), 46 R.F.L. (2d) 331 (P.E.I. S.C.); *Chauvin v. Chauvin* (1987), 6 R.F.L. (3d) 403 (Ont. Dist. Ct.).

170. (1987), 9 R.F.L. (3d) 225 (S.C.C.).

171. *Ibid.* at 258, *per* LaForest J. As with Minow's analysis of *Goss v. Lopez*, *supra*, note 99 and accompanying text, that "conflict was present long before anyone asserted in court that the students had rights," so too it is clear in *Frame* that the real "provocation" was not the father's lawsuit, but the mother's conduct in depriving the father of any relationship with his children (however, it is also likely, although the judgment itself provides no details, that the real origins of the conflict lie much deeper in the relationship between the parents during cohabitation). Thus, as a basis for the Court's decision in *Frame*, "the undesirability of provoking suits within the family circle" represents a particularly poor rationale. Far more persuasive would have been the manifest unsuitability of the tort remedy of money damages sought by the father, and the need to convey to the legislature the urgency of designing more effective and more sensitive mechanisms for the enforcement of access orders. In this respect, both Newfoundland and Manitoba have legislated specific mechanisms for the enforcement of access orders, and a bill that would establish a similar plan in Ontario has recently passed second reading in the provincial legislature. See Dorothy Lipovenki, "Parents, lawyers split on proposed bill to enforce child access," *Globe & Mail* (14 February 1989) A8.

sole custody¹⁷² and then looks at the methods by which Canadian courts have determined the parent who is awarded sole custody.¹⁷³

SOLE CUSTODY PRESUMPTION

Ten years after their initial enunciation, the leading Canadian pronouncements on the customary form of custody order remain the decisions of the Ontario Court of Appeal in *Baker v. Baker*¹⁷⁴ and *Kruger v. Kruger*.¹⁷⁵ Here, by restricting court-ordered joint custody to "the exceptional circumstances which are rarely, if ever, present in cases of disputed custody,"¹⁷⁶ the Court effectively established a strong presumption in favour of sole custody — a presumption that appears to have been relaxed, but not abandoned, by more recent judicial and legislative developments.¹⁷⁷

In *Baker*, the father appealed from the trial judgment ordering joint legal custody with care and control of the eight-year-old boy to the mother.¹⁷⁸ At trial, Boland J. had spoken glowingly of joint custody as a means of ensuring the continued "participation and influence" of both parents in the child's life, and of assisting separated parents "to find stability for their future relationships with their children" and to "understand that divorce is not the dissolution of a family but merely its reorganization."¹⁷⁹ Remarking that the increasingly common "breakdown of the traditional family" demands "new ways of defining post-divorce family structures," and declaring that the courts "must be responsive to the winds of change," she suggested that

[i]t would seem logical to begin with a presumption in favour of joint custody, as children who fare best after a divorce are those who are free to develop full and loving relationships with both parents.¹⁸⁰

In particular, she recommended that

[j]oint custody should be considered in cases where there are two parents who are well qualified to give affection and guidance to the child and where it can be reasonably

172. *Infra*, notes 174–199 and accompanying text.

173. *Infra*, notes 200–289 and accompanying text.

174. (1979), 8 R.F.L. (2d) 236 (Ont. C.A.) [hereinafter *Baker*].

175. (1979), 11 R.F.L. (2d) 52 at 78 (Ont. C.A.) [hereinafter *Kruger*].

176. *Baker*, *supra*, note 174 at 246.

177. In 1985, the federal *Divorce Act* was amended to provide *inter alia* that the court could grant custody or access "to any one or more persons." DA (1985), s. 16(4). A similar provision was included in 1984 amendments to the *Children's Law Reform Act*: CLRA, s. 28(a). See also *Parsons v. Parsons* (1985), 48 R.F.L. (2d) 83 (Nfld. U.F.C.) [hereinafter *Parsons*]; *Abbot v. Taylor* (1986) 2 R.F.L. (3d) 163 at 170 (Man C.A.); *Nurmi v. Nurmi* (1988), 16 R.F.L. (3d) 201 at 207 (Ont. U.F.C.).

178. *Baker v. Baker* (1978), 3 R.F.L. (2d) 193 at 196 (Ont. H.C.).

179. *Ibid.* at 197.

180. *Ibid.*

contemplated that they are capable of co-operating with each other in the best interests of the children.¹⁸¹

Finally, by recommending that the parents select an arbitrator to help settle future disagreements,¹⁸² she indicated that joint custody remains a viable option even where subsequent differences between the parents may be anticipated.

The Court of Appeal, however, saw matters quite differently, Emphasizing that previous cases had regarded joint custody as "an exceptional disposition, reserved for a limited category of separated parents,"¹⁸³ it ordered a new trial on the grounds that

[t]he learned trial judge asked herself the wrong question. Instead of asking which parent would best promote the welfare of the boy, she started from the presumption that both were fit parents entitled to joint custody.¹⁸⁴

First of all, the Court of Appeal questioned the empirical validity of Boland J.'s unsupported views on the alleged advantages of joint custody.¹⁸⁵ Instead, citing Weatherston J. (as he then was) in *McCahill v. Robertson*,¹⁸⁶ it adopted the equally unsubstantiated, but conventionally assumed, position that healthy child development necessitates absolute parental authority:

A child must know where its home is and to whom it must look for guidance and admonition and the person having custody and having that responsibility must have the opportunity to exercise it without any feeling by the infant that it can look elsewhere.¹⁸⁷

Second, the Court challenged Boland J.'s assessment that the parents could reasonably be expected to cooperate in a court-ordered joint custody arrangement. On the contrary, it held, the record at trial and the appellate proceeding itself demonstrated both the inability and the unwillingness of the two parents "to co-operate as loving parents."¹⁸⁸ Nevertheless, as the Court's emphasis on the term "loving parents" suggests, this conclusion did not so much contradict the Boland J.'s findings of fact as it reflected a significantly higher standard of cooperation for a joint custody arrangement than that considered necessary at trial. Specifically, given the appellate Court's assumptions regarding appropriate child development, it follows that joint custody is consistent with the welfare of the child only where the parents

181. *Ibid.*

182. *Ibid.* at 298.

183. *Baker, supra*, note 174 at 245.

184. *Ibid.* at 247.

185. *Ibid.* at 244.

186. (1974), 17 R.F.L. 23 (Ont. H.C.).

187. *Ibid.* at 23-24, cited in *Baker, supra*, note 174 at 246. The use of the pronoun "it" in this passage reflects an unfortunate tendency in the law of custody to objectify children as possessions or less-than-human beings.

188. *Baker, supra*, note 174 at 245.

cooperate to such a high degree that legal regulation itself is rendered unnecessary. In this respect, therefore, while Boland J. was willing to admit the possibility of subsequent disagreements (to be resolved by arbitration), the Court of Appeal adhered to a communitarian notion of the family as a sphere of intimate relationships with respect to which legal regulation is antithetical.

The *Kruger* decision, delivered less than six months earlier, was little more than a replay of *Baker*, with Wilson J.A. (as she then was) cast in the role of Boland J., and Thorson and Arnup J.J.A. reiterating the Court's earlier position in *Baker*.¹⁸⁹ Nonetheless, the case is useful to consider since it makes even more explicit the communitarian assumptions that underlie the expression of the sole custody presumption in *Baker*.

In *Kruger*, the father appealed from an order of maternal sole custody, in which he had been granted "reasonable and liberal" access.¹⁹⁰ Although the parents had clearly cooperated in a *de facto* shared parenting arrangement for two years prior to the trial, a majority of the Court, Wilson J.A. (as she then was) dissenting, dismissed the father's plea for joint custody on the grounds that court-imposed joint custody is unworkable, and that the mother had demonstrated her unwillingness to accept joint custody by the very action of contesting the father's petition on appeal.¹⁹¹ In effect, the Court concluded, joint custody should be ordered only when such an order is unnecessary, because the parties have already agreed to joint custody.¹⁹²

In dissent, Wilson J.A. (as she was then) echoed the views of Boland J. in *Baker*. First, she maintained, the best interests of the child usually dictate that the courts not choose between the parents, but rather that they "do everything possible to maintain the child's relationship with both parents."¹⁹³ While sole custody orders secure absolute parental authority for the custodial parent, they transform the non-custodial parent into a mere "visitor," a process that represents "a traumatic experience for a child, frequently attended by feelings of rejection and guilt."¹⁹⁴

Second, she explained, although separation or divorce necessarily severs the bond between the parents, it need not terminate the relationship that each parent has with his or her children.¹⁹⁵ The breakdown of the parental relationship should be viewed not as the dissolution of the family, but instead as a process through which the family is restructured in a different form. In this respect, moreover, it is mistaken to assume that the often intense personal conflict accompanying a separation or divorce, nor even the existence of a custody dispute itself, evidences irrevocable parental inability

189. In fact, Thorson J.A. participated in both decisions, concurring with the decision of Lacourciere J.A. in *Baker*, and delivering the majority decision in *Kruger*.

190. *Kruger*, *supra*, note 175 at 75.

191. *Ibid.* at 79, 82.

192. *Parsons*, *supra*, note 177 at 88, *per* Cameron J.

193. *Kruger*, *supra*, note 175 at 69.

194. *Ibid.* at 73.

195. "[W]hile placing care and control of a child and the making of day-to-day decisions in one parent or the other is a necessary consequence of the fact that husbands and wives stop living together when their marriage ends, terminating the participation of parents in the long-range aspects of their children's lives is not." *Ibid.* at 70.

to cooperate in a joint custody arrangement.¹⁹⁶ On the contrary, argued Wilson J.A. (as she then was):

Most mature adults, after the initial trauma has worn off, are able to overcome the hostility attendant on the dissolution of their marriages or at the very least are capable of subserving it to the interests of their children. This is particularly so now that the social stigma attending divorce has all but disappeared and men and women are picking themselves up and putting their lives together again.¹⁹⁷

In any event, she added, even where subsequent disagreements do arise, there is no reason why the parents cannot resort to the courts to seek a resolution.¹⁹⁸

Finally, therefore, Wilson J.A. (as she then was) favoured a fundamentally different standard to evaluate the appropriateness of a joint custody order from that proposed by the Court of Appeal in *Baker* and followed by the majority in *Kruger*. Instead of requiring a degree of cooperation that renders the need for legal regulation superfluous, she declared, the court should recognize continued participation by both parents as the general rule, limiting this involvement only "if the state of the husband and wife relationship is such as to make it necessary or desirable to do so."¹⁹⁹ Thus, she joined with Boland J. in recommending a presumption of joint rather than sole custody.

The striking similarities between both pairs of decisions bear some comment. It should not go unmentioned that of the eight judges involved in both decisions, six men ordered sole custody while the two women favoured joint custody. In this respect, the male and female judges reflected markedly different conceptions of the family. While Boland J. and Wilson J.A. (as she then was) recognized diversity of opinion, conflict and regulation by law as not inconsistent with family life, the remaining judges, all of them men, adhered to a traditional conception of the family in which disagreement must be suppressed rather than openly acknowledged and addressed, where parental authority must be absolute, and where legal regulation is both interventionist and coercive. Furthermore, while both female judges emphasized the relational character of the family and the potential for law to mediate and facilitate such relationships when the family is restructured upon marital breakdown,

196. "We accept now, I believe, that men and women who fall short as spouses may nevertheless excel as parents. We have also become increasingly aware over the last number of years that the context of a divorce action is the worst possible context in which to form an assessment of the spouses as people let alone as parents. The adversarial process by its nature requires each spouse to attack the other in order to protect his or her economic interests. This has caused an undue emphasis to be placed at trial on the deterioration of the husband and wife relationship and not enough on the parent and child relationship." *Ibid.* at 69.

197. *Ibid.* at 73.

198. "And what if occasional resort has to be made to the courts when the parents cannot agree on a major matter affecting the child? Is this to be the determinative consideration? It seems to me to be a modest price to pay in order to preserve a child's confidence in the love of his parents and with it his own sense of security and self-esteem." *Ibid.*

199. *Ibid.* at 70.

the male judges refused to acknowledge that a new family form might exist post-divorce – thereby effectively severing one of the parent-child relationships.

INTERPRETING BEST INTERESTS

As more than one commentator has pointed out, the welfare principle itself is inherently indeterminate.²⁰⁰ Not only must decision-makers divine the future if they are to assess the prospects of each available placement option;²⁰¹ they must also adopt a particular set of values in order to interpret the meaning of “the best interests of the child.” But as Mnookin explains:

Deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself. Should the judge be primarily concerned with a child's happiness? Or with the child's spiritual and religious training? Should the judge be concerned with the economic “productivity” of the child when he [or she] grows up? Are the primary values in life in warm, interpersonal relationships, or in discipline and self-sacrifice? Is stability and security for a child more desirable than intellectual stimulation?²⁰²

Not surprisingly, then, the manner in which both courts and legislators have interpreted the best interests of the child tells us less about the actual welfare (however defined) of the individual children involved than it does about prevailing societal norms, scientific theories and judicial assumptions regarding childhood needs and family life. For contemporary custody determinations, therefore, the implications of the welfare principle are threefold: first, to the extent that current conceptions of family life have become increasingly pluralistic, the resolution of custody disputes has become correspondingly indeterminate; second, in the face of this indeterminacy, courts have increasingly turned to the behavioural sciences for ostensibly precise and objective answers; third, notwithstanding this reliance on psychological theory, judicial interpretations of the child's best interests continue to reveal the cultural biases of a judiciary whose composition is far from representative of society as a whole. Aside from the dominant societal assumptions regarding appropriate family life and/or prevailing scientific theories regarding healthy child development, the best interests of the child are nothing more nor less than what the presiding judge happens to say they are.

Historical Background

It is perhaps not surprising that the triumph of the welfare principle as the paramount consideration in all custody disputes corresponds with the rising influence of psychological theory in the 1920s, especially Freudian theories of child development

200. See, e.g., Mnookin, *supra*, note 1 at 255–61;

201. *Ibid.* at 257–60. See also Freeman, *Rights and Wrongs of Children*, *supra*, note 71 at 202.

202. Mnookin, *supra*, note 1 at 260.

and maternal attachment.²⁰³ Conceiving as natural and universal a culturally and historically specific form of family life in which childrearing is typically carried out by women in "private" families, these theories and the conventional notions which accompanied them had an enormous influence upon both the structure of custody law and outcomes of actual custody disputes. Above all, the development of the best interests test signalled the decline of proprietorial notions of fathers' sacred rights to the custody of their children,²⁰⁴ and the emergence of a strong presumption of maternal custody, especially in the case of very young children.

In Canadian law, the classic expression of this "tender years" doctrine is the 1955 case of *Bell v Bell*.²⁰⁵ In awarding sole custody of the young daughter to the mother, the Ontario Court of Appeal pronounced:

No father, no matter how well-intentioned or how solicitous for the welfare of such a child can take the full place of the mother. Instinctively, a little child, particularly a little girl, turns to her mother in her troubles and her fears. ... This is nothing new; it is as old as human nature and has been recognized time after time in the decisions of our Courts.²⁰⁶

As late as 1976, a majority of the Supreme Court of Canada referred to "the view that children of tender years should be given to the custody of their mother" as "a principle of common sense."²⁰⁷ Since then, other Canadian courts have continued to invoke the doctrine.²⁰⁸

While this maternal presumption became the dominant feature of custody determinations in the fifty years following the emergence of the best interests test in the 1920s, it never attained the status of the paternal rule that had preceded it. First, the presumption applied only to young children, so that fathers retained a claim to the custody of older children. In 1933, for example, the Ontario Court of Appeal combined both the "tender years" doctrine with common law principles of sole parental custody to formulate a "general rule" stating:

[T]he mother ... is entitled to the custody and care of a child during what is called the period of nurture, namely, until it attains about 7 years of age, the time during which it needs the care of the mother more than that of the father, and then the father as against the mother becomes entitled to the custody and care of his child.²⁰⁹

203. For a prominent post-war statement of these theories, see John Bowlby, *Child Care and the Growth of Love*, (Harmondsworth: Penguin, 1953).

204. Maidment, *supra*, note 73 at 154.

205. [1955] O.W.N. 341 (C.A.).

206. *Ibid.* at 344.

207. *Talsky v. Talsky* (1976), 21 R.F.L. 27 (S.C.C.).

208. See, e.g., *Miron v. Miron* (1978), to A.R. 550 (T.D.) [hereinafter *Miron*]; *Re Laverty* (1979), 94 D.L.R. (3d) 402 (Sask. Q.B.); *Grills v. Grills* (1982), 30 R.F.L. (2d) 390 at 399 (Alta. Prov. Ct. Fam. Div.).

209. *Re Orr* (1933), 2 D.L.R. 77 at 80-81 (Ont. C.A.), *per* Mulock C.J.O.

Thus, while the father had inherent rights, the mother's entitlement was wholly derivative upon the welfare of the child.

Second, therefore, unlike the nineteenth century rule of paternal primacy, the "tender years" doctrine was never based on the mother's rights, but only on the court's interpretation that maternal custody coincided with the welfare of the child. Indeed, the underlying reason for the presumption was the view that the interests and needs of children could be best met by the mother.²¹⁰ As a result, as one American court explained, custody would not be awarded to the mother where she displayed otherwise "undesirable traits."²¹¹ Primary among these, in an era when family law was predicated upon upholding the institution of marriage, was matrimonial fault.²¹² Thus, where the mother was found guilty of "adultery" or "desertion," custody was invariably awarded to the father. In 1962, Lord Denning justified this result "as a matter of simple justice."²¹³ More generally, the award of custody to the innocent party was simply rationalized as being in the best interests of the child.²¹⁴

It was the combination of the traditional theory of matrimonial guilt with the naturalist assumptions of the "tender years" doctrine that gave birth to the split custody order, a practice that began in Great Britain in the 1930s.²¹⁵ Once again, in the leading case of *Wakeham v Wakeham*,²¹⁶ it was Lord Denning who appeared as the guardian of the sanctity of marriage. Awarding legal custody to the father and physical custody to the mother, he declared:

Cases often arise in Divorce Court where a guilty wife deserts her husband and takes the children with her, but the father has no means of bringing them up himself. In such a situation, the usual order is that the father, the innocent party, is given custody of the child or children, but care and control is left to the mother. That order is entirely realistic.²¹⁷

The New Family Law

Canadian family law has undergone remarkable changes over the past twenty years. Beginning with the passage of the federal *Divorce Act* in 1968,²¹⁸ this transformation has been inspired by two fundamental principles: the juridical equality of men and women, and the autonomy of spouses and unmarried cohabitants to determine the form and content of their own relationships free of definition by the state. For custody law, these developments have had two immediate consequences: first, the disappear-

210. Maidment, *supra*, note 73 at 182.

211. *Jenkins v. Jenkins*, 181 NW 826 at 827 (Wis 1921).

212. Maidment, *supra*, note 73 at 5.

213. *Re L* (1962), 3 All E.R. 1 at 4 (C.A.), *per* Denning L.J.

214. As Maidment explains, this interpretation posed no difficulty for the judges of the time since "[i]n their world-view the child's welfare was actually served by upholding the institutions of the family and marriage, and in this they were merely reflecting the dominant social ideology." Maidment, *supra*, note 73 at 6.

215. *Ibid.* at 155-56.

216. [1954] 1 All E.R. 434 (C.A.).

217. *Ibid.* at 436, *per* Lord Denning.

218. R.S.C. 1970, c. D-8 [hereinafter DA (1968)].

ance of presumptions based solely upon the gender of the claimant; second, the decline of matrimonial fault as a basis for awarding custody to the "innocent" party.

The former development is apparent in the recent case of *R. v. R.*,²¹⁹ where a majority of the Alberta Court of Appeal decisively rejected the "tender years" doctrine as biological determinism. Invoking Albert Einstein's observation that "common sense is [nothing more than] the collection of prejudices acquired by age 18," Kerans J.A. wrote:

That the female human has some intrinsic capacity, not shared by the male, to deal effectively with infant children is an assumption that was once conventionally accepted but is now not only doubted but widely rejected. . . . This view confuses cultural traditions with human nature; it also traps women in a social role not necessarily of their choosing, while at the same time freeing men: if only a mother can nurture a child of tender years, then it is the clear duty of the mother to do so; because the father *cannot* do so, he is neither obliged nor entitled even to try it. Also, it is seen by some as self-perpetuating: by putting the female child in the custody of somebody who accepts the maternal role model so described, the rule ordains that she will have just such a role model at close hand during her most impressionable years. Thus, the "tender years principle", which at first glance seems only innocently sentimental, is seen by many as part of a subtle, systemic sexual subordination.²²⁰

Although some recent cases suggest that the "tender years" doctrine refuses to die,²²¹ there is little doubt that its disappearance is imminent.

In Canada, the decline of matrimonial fault began with the 1968 *Divorce Act*, which first introduced a form of no-fault divorce.²²² On the other hand, the legislation retained the traditional grounds of matrimonial misconduct,²²³ and stipulated that in making an order for "the custody, care and upbringing of the children of the marriage," the court should consider "the conduct of the parties" as well as "the condition, means and other circumstances of each of them."²²⁴ Thus, while fault ceased to be a necessary condition for divorce, it remained a necessary consideration for custody. Only with the 1985 amendments to the federal *Divorce Act* was matrimonial guilt expressly abolished as a justification for an award of custody. Even then, while the law deems past conduct in itself irrelevant to the determination of custody, it allows such considerations where the court considers the conduct "relevant to the ability of that person to act as a parent of a child."²²⁵ Nevertheless,

219. (1983), 34 R.F.L. (2d) 278 (Alta. C.A.).

220. *Ibid.* at 285-86.

221. See, e.g., *Grills, supra*, note 208; *Bendale v. Bendale* (1985), 48 R.F.L. (2d) 120 (Ont. Prov. Ct.).

222. DA (1968), s. 4(1)(e).

223. *Ibid.* s. 3.

224. *Ibid.* s. 11(1).

225. DA (1985), s. 16(9). Virtually identical wording appears in the *Children's Law Reform Act*: CLRA, s. 24(3).

despite this proviso – which, as the discussion below reveals,²²⁶ has allowed determined judges to reassert notions of fault – the direction of the new family law away from fault-based custody determinations is unquestionable.

Indeterminacy and the Statutory Guidelines

Together, the decline of the “tender years” doctrine and disappearing theory of matrimonial fault have rendered custody determinations under the welfare principle increasingly indeterminate. With the passage of these traditional presumptions, judges have been left without any consistent source of values from which to impart concrete meaning to the vague language of “the best interests of the child”.

While several Canadian jurisdictions have attempted to respond to this dilemma by formulating specific statutory guidelines to structure the court’s interpretation of child welfare, these instructions have been appropriately characterized by Anita Fineberg as “vague catch-phrases at best and meaningless rhetoric at worst.”²²⁷ Thus, for example, the 1985 *Divorce Act* stipulates that the court, in determining the best interests of the child, shall have reference to “the condition, means, needs and other circumstances of the child.”²²⁸ Similar expressions appear in provincial legislation.²²⁹ Even the more detailed considerations enumerated in the Ontario *Children’s Law Reform Act* are little better.²³⁰

Both singularly and in combination, these factors provide sufficient flexibility to allow for wide judicial discretion in evaluating the best interests of the child. Thus, for example, while the court is required to consider “the views and preferences of the child” this obligation arises only where they can be “reasonably ascertained.”²³¹ There is no agreement on how old a child must be before his or her wishes are considered, the mechanism by which these views are to be taken into account, nor at what age, if any, the preferences of the child should prevail. More generally, to the extent that these considerations represent mere guidelines for determining the best

226. *Infra*, notes 261–271 and accompanying text.

227. Anita Fineberg, “Joint Custody of Infants: Breakthrough or Fad?” (1979), 2 Can. J. Fam. L. 417 at 419.

228. DA (1985), s. 16(8).

229. See, e.g., CLRA, s. 24(2) (instructing the court to consider “all the needs and circumstances of the child”).

230. In addition to “the needs and circumstances of the child” the legislation requires the court to consider: “(a) the love, affection and emotional ties between the child and, (i) each person entitled to or claiming custody of or access to the child, (ii) other members of the child’s family who reside with the child, and (iii) persons involved in the care and upbringing of the child; (b) the views and preferences of the child, where such views and preferences can reasonably be ascertained; (c) the length of time the child has lived in a stable home environment; (d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessities of life and any special needs of the child; (e) any plans proposed for the care and upbringing of the child; (f) the permanence and stability of the family unit with which it is proposed that the child will live; and (g) the relationship by blood or through an adoption order between the child and each person who is a party to the application.” CLRA, s. 24(2).

231. *Ibid.* s. 24(2)(b).

interests of the child – guidelines which the court itself must weigh in the context of the specific dispute before it – they fail to confine the inherent indeterminacy of the welfare principle.

Behavioural Science and the Status Quo

In the face of this manifest uncertainty, the courts have increasingly looked to the behavioural sciences to supply supposedly clear and objective answers. On one level, provincial legislation authorizes the court to order expert assessments of the claimants and the child,²³² and parents themselves may present psychological evidence to support their respective claims.²³³ Nevertheless, since definitive conclusions are virtually impossible to state in the absence of gross psychopathology,²³⁴ these opinions often reflect little more than the unexpressed social values of the mental health professional.²³⁵ Consequently, the courts have been reluctant to delegate effective decision-making authority to experts, no matter how well qualified, but have regarded such assessments merely as "helpful factor[s], to be weighted and assessed along with all other relevant evidence."²³⁶

On the other hand, notwithstanding the equally contested character of scientific theories of child development,²³⁷ Canadian courts have implicitly drawn upon the psychological theories of Goldstein, Solnit and Freud to fashion a new judicial presumption, favouring sole custody by the adult(s) with whom the child is living (and has been living for some time) at the time of the trial.²³⁸ Assuming that children can, or should in their own best interests, tolerate only one psychological parent,²³⁹ this *status quo* presumption attempts to ensure for the child continuity of care by the parent who, by virtue of the residential arrangements adopted since the separation, is most likely to fit the description of the child's "sole psychological parent."

The first clear statement of the *status quo* presumption in Canadian law was the decision of the Ontario Court of Appeal in *Re Moores and Feldstein*.²⁴⁰ There, the mother had placed her daughter in the care of the Feldsteins shortly after her birth, hoping for a reconciliation with her husband, who was not the child's father. Several months later, when the mother requested the return of the child, the Feldsteins refused. By the time legal proceedings were initiated and the matter came to trial, however, the girl was four years old. Although the trial judge awarded custody to the

232. CLRA, s. 30.

233. Abella, *supra*, note 134 at 459.

234. Rena K. Uviller, "Father's Rights and Feminism: The Maternal Presumption Revisited" (1978), 1 Harv. Wom. L. J. 107 at 125.

235. Mnookin, *supra*, note 1 at 287.

236. *Gauci v. Gauci* (1973), 9 R.F.L. 189 at 193 (Ont. S.C.).

237. Maidment, *supra*, note 73 at 8. See also Skolnick, *supra*, note 58 at 38–43, 60–61.

238. In terms of the statutory guidelines enumerated in the Ontario *Children's Law Reform Act*, this presumption finds support in sections 24(2)(a) and 24(2)(c).

239. Jeffery Wilson, "Possession is Power: 'Bonding' as Nine-Tenths of the Law" (1987), Canadian Bar Association-Ontario, 1987 Annual Institute on Continuing Legal Education, at 23.

240. (1973), 12 R.F.L. 280 (Ont. C.A.).

biological mother, the Court of Appeal reversed the decision on the grounds that the child might suffer "serious harm" if removed from her surroundings and placed "in the custody and care of someone who would now likely be quite a stranger to her."²⁴¹

First declared in a dispute between natural and social parents, and subsequently confirmed in this same context by the Supreme Court of Canada,²⁴² the *status quo* presumption is also widely applied in custody disputes between divorced or separated couples.²⁴³ As early as 1971, for example, a survey of Ontario Supreme Court judges revealed a strong reluctance to disturb the *status quo*, particularly where the child had been living with one parent for six months or more.²⁴⁴ More recently, a New Brunswick court declared it to be "established law" that

... where the children have resided with one parent since the separation, during which time their situation has stabilized, courts will normally seek to avoid disruption for the children.²⁴⁵

Consequently, as James McLeod has explained, provisional custody arrangements have a considerable impact upon the final disposition of most custody disputes, since continuous residence "in a stable and satisfactory environment creates the *status quo*."²⁴⁶

While this judicially created presumption clearly provides much greater certainty than do the current statutory guidelines, it is not without its defects.²⁴⁷ First, the rule creates powerful incentives for adults with some relationship with the child to engage in strategic behaviour directed at establishing a stronger custody claim based on the child's existing residence. As more than one critic has pointed out,²⁴⁸ this effect contradicts the welfare of children as a whole by discouraging parents from adopting interim custody arrangements solely on the basis of the best interests of their children, by encouraging the abduction of children by separating parents, and by deterring parents from leaving children in the temporary care of third parties while they endeavour to resolve emotional or economic difficulties.

241. *Ibid.* at 288.

242. See, e.g., *Racine v. Woods* (1984), 36 R.F.L. (2d) 1 (S.C.C.); and *King v. Low* (185), 44 R.F.L. (2d) 113 (S.C.C.).

243. See, e.g., *Lawrence v. Lawrence* (1975), 13 N.B.R. (2d) 637 at 639 (Q.B.); *McPherson v. McPherson* (1982), 31 R.F.L. (2d) 380 at 383 (Sask. Q.B.); *B. v. B.*, Ont. D.C., No. 7629/82, 6th December 1982, [1983] W.D.F.L. 055 at 6; *Sherrett v. Sherrett* (1987), 6 R.F.L. (3d) 172 (Ont. C.A.); *Sickmann v. Sickmann* (1988), 15 R.F.L. (3d) 307 (Alta. Q.B.).

244. Adrian Bradbrook, "An Empirical Study of the Attitude of Judges of the Supreme Court of Ontario Regarding the Workings of the Present Child Custody Adjudication Laws" (1971), 49 Can. Bar Rev. 557 at 565-66.

245. *Doucette v. Bourque* (1983), 44 N.B.R. (2d) 441 at 443 (Q.B.), per Logan J.

246. James McLeod, "Annotation" to *Davis v. Davis* (1986), 3 R.F.L. (3d) 30 (Man. Q.B.).

247. For the purposes of the analysis in this section we do not consider the numerous criticisms levelled against the more general sole custody presumption, however determined. Nevertheless, see *infra*, notes 323-365 and accompanying text.

248. See, e.g., Wilson, *supra*, note 239 at 3; and Jon Elster, "Solomonic Judgments: Against the Best Interests of the Child" (1987), 54 U. Chi. L. Rev. 1 at 21-22.

Second, notwithstanding its improvement upon the existing statutory guidelines, three factors limit the extent to which the *status quo* presumption is able to guarantee determinate outcomes to custody disputes. To begin with, as Bradbrook's survey of Ontario judges revealed, residency does not establish the *status quo* unless it persists unaltered for a considerable period of time (roughly six months). Thus, where the issue comes to trial shortly after the parents have separated, or where physical custody has been shared in the interim, the presumption does not supply a determinate answer. Similarly, the presumption carries considerably less weight where the child has lived with one parent but the other has maintained regular contact since the separation. Finally, and above all, the *status quo* alone is not conclusive, but is itself subject to the additional proviso that this residential arrangement provide the child with "a stable and satisfactory environment." As the Prince Edward Island Court of Appeal emphasized in the recent case of *Mooney v. Mooney*.²⁴⁹

The trial judge, on a custody application, must consider many factors in order to arrive at the situation which will be in the best interests of the children. The present custodial situation is one of these factors and one which is given considerable weight but not one that can be considered in isolation to many other factors.²⁵⁰

Thus, the courts continue to retain substantial discretion to evaluate the specific details of alternative custody arrangements.

Judicial Discretion and Family Autonomy

Above all, by leaving to the court the discretion to evaluate the "stability" of the family unit in which the child shall live, the *status quo* presumption continues to accord considerable authority to the presiding judge to determine the values by which the "best interests of the child" are to be ascertained. In this respect, contemporary custody decisions invariably violate fundamental principles of family autonomy both in the process by which they are reached, and in the specific outcomes themselves.

The current process of custody litigation challenges family autonomy both by the questions that the best interests test deems relevant to the outcome, and by the methods by which the courts endeavour to answer these questions. As already explained, the welfare principle involves "person-oriented" determinations which compel the court to engage in detailed scrutiny of the personal lives of the claimants, necessitating a more inquisitorial approach than traditional "act-oriented" adjudication, and rationalizing the use of psychological assessments to aid the court in its decision.²⁵¹ Indeed, the best interests standard encourages the parents themselves to

249. (1988), 15 R.F.L. (3d) 347 (P.E.I.C.A.).

250. *Ibid.* at 350. See also *R. v. R.*, *supra*, note 219 at 283-84 (*status quo* arrangements more important on applications for interim custody order than final disposition where "the parties cannot . . . be treated as having somehow waived the right to put a different proposal"); *Brown v. Brown* (1986), 2 R.F.L. (3d) 173 (P.E.I.C.A.) (judge must weigh alternative arrangements to determine best interests overall).

251. See *supra*, notes 132-36 and accompanying text.

emphasize the other's failings both as a parent and as a person.²⁵² Once the initial decision is made to resort to the court, control of the process is taken away from the family members themselves and invested in the authority of the court. At this point, the extent to which the process respects the autonomy and integrity of the parties involved is entirely at the discretion of the presiding judge. While many undoubtedly exercise this discretion with sensitivity and care, the very possibility of bias and abuse is a matter for considerable concern.²⁵³

Of course, the process of any adjudicative exercise is merely the prelude to its outcome. Here too, however, judicial applications of the best interests test have consistently proven destructive of family autonomy. In 1983, for example, the Saskatchewan Court of Appeal upheld a decision in which the mother was awarded sole custody in part because the trial judge considered the father's religious beliefs to be contrary to the best interests of the three children.²⁵⁴ Responding to the father's claim that the ruling had infringed his *Charter* rights to "freedom of conscience and religion,"²⁵⁵ the Court merely declared that:

[the trial judge] was required to consider the effect on the welfare of the children of the religious beliefs and practices of the [father] and in so doing he did not contravene either the *Bill of Rights* or the *Constitution Act*, 1982.²⁵⁶

Similarly, broad statutory provisions requiring the court to consider proposed plans "for the care and upbringing of the child,"²⁵⁷ the "permanence and stability of the family unit" proposed for the child,²⁵⁸ and the "ability and willingness" of each claimant "to provide the child with guidance and education, the necessities of life and any special needs of the child"²⁵⁹ disregard parental autonomy to determine the norms and structures of their own family relationships (above a minimum standard established by child welfare legislation). As a result, in deciding the outcomes of specific custody disputes, courts repeatedly consider the financial status of each parent²⁶⁰ (a factor that almost always works to the disadvantage of mothers), and judges inevitably apply their own conceptions of appropriate family values and methods of childrearing. Given the current composition of the Canadian judiciary,

252. This is particularly true in light of the sole custody presumption which fashions a winner-loser result.

253. See, e.g., Phyllis Chesler, *Mothers on Trial: The Battle For Children and Custody* (Seattle: The Seal Press, 1986); Susan Boyd, "Child Custody and Working Mothers," in Sheila L. Martin and Kathleen E. Mahoney, eds., *Equality and Judicial Neutrality*, (Toronto: Carswell, 1987) at 172-73.

254. *Brown v. Brown* (1983), 3 D.L.R. (4th) 283 (Sask. C.A.) [hereinafter *Brown*].

255. Canadian Charter of Rights and Freedoms, *Constitution Act*, 1982, s. 2(a).

256. *Brown*, *supra*, note 254 at 289.

257. CLRA, s. 24(2)(e).

258. *Ibid.* s. 24(2)(f).

259. *Ibid.* s. 24(2)(d).

260. See, e.g., *Fullerton v. Richman* (1983), 40 O.R. (2d) 395.

the consistent articulation of traditional assumptions regarding the proper form of family life should come as no surprise.

Thus, for example, despite the express abolition of matrimonial fault as a basis for deciding custody, judges continue to withhold custody on the basis of the claimant's adultery. This result is often achieved by the court's assessment that the adultery reflects a willingness to place selfish interests above those of the child.²⁶¹ More generally, one recent Ontario decision goes so far as to suggest that the parent who seeks a divorce ought by that reason alone to be denied custody.²⁶² In awarding sole custody to the father, Misener D.C.J. observed that

[the mother] was quite prepared – and I think that she consciously thought about it – to deprive the children of the benefit of the constant presence of a good father, of at least a good husband, if not a totally satisfactory one, and of a reasonably harmonious family relationship for no other reason than to find more excitement in life.²⁶³

Similarly, a number of courts have looked harshly upon custody claimants who enter into relationships of unmarried cohabitation following separation.²⁶⁴ In 1979, for example, one Ontario judge awarded sole custody to the father on the grounds that it was not in the child's best interest to be exposed to such an environment.²⁶⁵ As McNab Co. Ct. J. explained:

One is immediately faced with the fact that what the wife proposed to do is to bring the children into a home where she and her paramour are living in adultery. The courts, in many cases, have expounded on the adverse effects on children of such an arrangement. It therefore seems unnecessary to say that it is not in the best interests of the children to be taken from a respectable home and exposed to that, unless there are other factors that would warrant the court doing so.²⁶⁶

More recently, the British Columbia Court of Appeal upheld a trial decision granting custody of a four-year-old girl to the father in part because the mother "had engaged in a series of common law relationships."²⁶⁷ As McLachlin J.A. (as she then was) wrote for the Court: "The court must be concerned with the future stability of the home in

261. See, e.g., *Nielson v. Nielson* (1971), 5 R.F.L. 313 (Ont. H.C.); *Bosch v. Bosch* (1985), 49 R.F.L. (2d) 157 (Sask. Q.B.) [hereinafter *Bosch*]; *Stephens v. Stephens* (1986), 4 R.F.L. (3d) 200 (B.C.S.C.).

262. *Fishback v. Fishback* (1985), 46 R.F.L. (2d) 44 (Ont. Dist. Ct.).

263. *Ibid.* at 49 *per* Misener D.C.J. The *Fishback* decision also represents a classic example of how the process of contemporary custody determinations, as well as their substantive outcomes, infringe basic values of family autonomy.

264. See, e.g., *Friday v. Friday* (1975), 20 R.F.L. 202 (Sask. Q.B.); *Veighey v. Veighey* (1977), 3 R.F.L. (2d) 148 (Ont. Div. Ct.).

265. *Gilbert v. Gilbert* (1979), 10 R.F.L. (2d) 385 (Ont. Co. Ct.).

266. *Ibid.* at 389.

267. *Bell v. Kirk* (1986), 3 R.F.L. (3d) 377 at 380 (B.C.C.A.).

which the child is placed."²⁶⁸ Similarly, in *Klachevsky v. Brown*,²⁶⁹ the Manitoba Court of Appeal overturned a lower court decision awarding sole physical custody to the father partly on the grounds that he had been involved with three women since the marriage (the third of whom he had married).²⁷⁰ According to O'Sullivan J.A. (Huband J.A. concurring):

[T]he [trial] judge fell into error in failing to take into account the father's record of instability in his home life compared with [the mother's] stability.²⁷¹

So too, several courts have displayed a strong aversion to child care provided outside the home. In *R. v. R.*,²⁷² the Alberta Court of Appeal upheld a trial decision awarding sole custody to the father because work on the family farm allowed him to spend more time with the four-year-old daughter than did the mother's employment. Noting that the paternal grandmother was "available for housekeeping and babysitting chores" when the father was engrossed by "peak work periods," the trial judge had declared that:

If the father has custody of the child, it is apparent that there will be much less need for a delegation to others of the daily care and upbringing of the child.²⁷³

In this evaluation, the Court of Appeal was unable to find any manifest error.²⁷⁴ Similarly, in *Klachevsky v. Brown*,²⁷⁵ a Manitoba trial court granted custody to the remarried father since "the new Mrs. Klachevsky will be available to the children 24 hours a day" so that there was no need to rely on "daycare or other hired child caretakers."²⁷⁶ In this case, however, the Manitoba Court of Appeal reversed the trial judge, concluding that he had committed a "palpable error" in placing "undue emphasis" on the mother's need for "paid assistance to provide care for her children."²⁷⁷

268. *Ibid.*

269. (1988), 12 R.F.L. (3d) 280 (Man. C.A.) [hereinafter *Klachevsky*].

270. A second issue involved the trial judge's emphasis on "the fact that the mother might have to rely on paid daycare for two hours a day while she looks after the children in Vancouver." *Ibid.* at 284. This aspect of the case is examined at *infra*, notes 275-277 and accompanying text.

271. *Ibid.*

272. *Supra*, note 219.

273. Cited in *ibid.* at 281.

274. *Ibid.*

275. (1987), 9 R.F.L. (3d) 428 (Man. Q.B.).

276. *Ibid.* at 432.

277. *Klachevsky*, *supra*, note 269 at 282. On the other hand, even here, O'Sullivan J.A. (Huband J.A. concurring) was careful to point out (at 282-83) that "there is available to the mother extended family in Vancouver," and: "The younger child is now enrolled in kindergarten where he spends part of the day. Another portion of the day is spent in a daycare facility, until he graduates to Grade I in six months' time. Both children will be returning home from school around 3:30 p.m. but the mother does not arrive home from work until around 5:30 p.m. She has made arrangements for a competent person to be at the home from 3:00 o'clock on until the mother's arrival." One wonders whether the result would have been the same had the children been younger and paid child care required for more than two hours each day for the older child and somewhat longer for the younger (but with only six months remaining before beginning Grade I).

Finally, homosexual claimants present particularly easy targets for the bigoted judge.²⁷⁸ In 1974, for example, a Saskatchewan court denied custody to a lesbian mother on the grounds that "if these children are raised by their mother they will be too much in contact with people of abnormal tastes and proclivities."²⁷⁹ While more recent decisions do not as a general rule consider homosexuality a complete bar to custody, they nonetheless consider it a relevant factor for consideration.²⁸⁰ In this respect, several courts have speculated on the alleged dangers of granting custody or access to an openly homosexual parent: the possibility that the child will experience social stigma,²⁸¹ the risk of psychological damage,²⁸² and above all the long-standing homophobic anxiety that homosexual parents will indoctrinate their children into becoming homosexuals themselves.²⁸³

In one recent Ontario case, for example, while Nasmith Fam. Ct. J. awarded custody of the 10-year-old daughter to her lesbian mother, he was careful to point out that the mother was "not militant," did "not flaunt her homosexuality," did not engage in "overt sexual contact" with her partner, and was not "biased about [her daughter's] sexual orientation" but instead appeared "to assume that [she would] be heterosexual."²⁸⁴ Similarly, a recent Saskatchewan ruling denied overnight access to a non-custodial father so long as he continued to live with his male lover.²⁸⁵ Most tragic is the case of *Bezaire*.²⁸⁶ Here, the trial judge had granted custody to the lesbian mother, with the condition that "no other person shall reside with Mrs. Bezaire without the approval of the judge."²⁸⁷ When the mother disregarded this proviso, the father obtained an order from the same judge transferring custody to him. On appeal, the Ontario Court of Appeal emphasized that homosexuality itself does not preclude custody but, nevertheless, Wilson J.A. (as she then was) dissenting, refused to question the propriety of the conditional order, treated its violation by the mother as evidence of her psychological unfitness, and upheld the trial judgment.²⁸⁸ Several months later, as Wendy Gross relates, the mother took the children and left for the United States, where she remained until 1985 when she voluntarily surrendered herself to the police in Windsor to stand trial on six counts of abduction and harbouring.²⁸⁹

Contemporary child welfare legislation does not remove children from the custody

278. See generally Wendy Gross, "Judging the Best Interests of the Child: Child Custody and the Homosexual Parent" (1986), 1 C.J.W.L. 505.

279. *Case v. Case* (1974), 18 R.F.L. 132 at 138 (Sask. Q.B.).

280. *Bezaire v. Bezaire* (1980), 20 R.F.L. (2d) 358 (Ont. C.A.) [hereinafter *Bezaire*].

281. For an excellent treatment of this issue, see Gross, *supra*, note 278 at 514-20.

282. *Ibid.* at 509-12.

283. *Ibid.* at 520-23. Even if this manifestly false allegation was true, to deny custody to a homosexual parent on this basis would clearly contradict principles of family autonomy. Why should sexual orientation be treated any differently than minority religious views?

284. *Re Barkley and Barkley* (1980), 28 O.R.(2d) 136 (Prov. Ct.).

285. *Worby v. Worby* (1985), 48 R.F.L. (2d) 369 (Sask. Q.B.).

286. *Supra*, note 280.

287. Cited in *ibid.* at 361.

288. *Ibid.* at 365.

289. Gross, *supra*, note 278 at 527.

of their parents where the parents have extra-marital sex, where they are unmarried, where they both work and rely upon paid child care outside the home, nor indeed where they are homosexuals. Nor do Canadian courts declare children "in need of protection" because of the financial status of the family, because the "family unit" is neither "permanent" nor "stable," because a judge happens to disagree with parental plans for "the care and upbringing of the child," nor because the parents happen to hold minority religious beliefs. In all these circumstances, Canadian law recognizes the autonomy of the family members themselves to determine their own collective existence. Under the best interests test, on the other hand, contemporary custody law may make any or all of these considerations relevant to the outcome of any given custody dispute. In so doing, the law disregards fundamental values of individual and family autonomy.

Substantive Custody Reform

While some evaluations of contemporary custody law criticize the present regime for contradicting the principles of gender equality and family autonomy that inform the new family law, most recommendations for the substantive modification of custody rules emphasize the many ways in which the current system consistently fails to advance the welfare of children as a whole. Nevertheless, the two leading reform proposals²⁹⁰—for a judicially devised primary caregiver presumption and for a statutory presumption recommending joint custody—are typically rationalized in terms of children's best interests (welfare considerations) *and* according to a vision of justice associated with the central principles of the new family law (considerations of justice). In this respect, each alternative reflects both child protection and private dispute-settlement rationales for deciding custody disputes.

This section evaluates both presumptions by examining the two sets of justifications — welfare-oriented and justice-based — advanced in favour of each. Specifically, we conclude, while both rules promise distinct improvements upon the capacity of the current system to further the welfare of children as a whole,²⁹¹ a joint custody presumption may offer additional benefits that are absent in a regime favouring sole custody by primary caregivers.²⁹² On the other hand, the evidence upon which this highly tentative conclusion is based is extremely uncertain.²⁹³ Regardless, in neither

290. We ignore for purposes of this discussion proposals to restore the maternal presumption or to introduce a "same sex" presumption, that would place female children with their mothers and male children with their fathers. For a defence of the former approach, see Uviller, *supra*, note 234. For an assertion of the latter view, see John Santrock and Richard Warshak, "Father Custody and Social Development in Boys and Girls" (Fall 1979), *J. Soc. Issues* 112. For an analysis of both approaches and a highly tentative recommendation for the latter "same sex" rule, see Chambers, *supra*, note 53 at 512-13, 515-27, 559-60. In each case, these rules contradict principles of gender neutrality in the new family law by replicating existing patterns of gender socialization.

291. *Infra*, notes 315, 385, 398 and accompanying text.

292. *Infra*, notes 323-354, 385 and accompanying text.

293. *Infra*, notes 386-397 and accompanying text.

case is the burden of justification met that parental inability to agree on post-separation custody arrangements necessarily places children at risk and in need of protection.²⁹⁴ Consequently, unless parental separation itself is to be treated as pathological and families are to be identified solely with pre-separation configurations, family autonomy requires that custody law emphasize the function of private dispute-settlement rather than that of child protection.

From the perspective of private dispute-resolution, however, the highly contextual and relational character of justice within the family context makes it impossible to support either the primary caregiver or the joint custody reform. First, to the extent that both approaches are conceived as mere presumptions for determining the best interests of the child, they remain wedded to a conception of custody law in which the function of child protection is paramount. As a result, they continue to allow varying degrees of judicial discretion, thereby preserving the indeterminacy of the current regime and the corresponding authority of the courts to introduce alien norms into the resolution of intra-familial disputes.²⁹⁵ Second, by imposing a monolithic structure on post-separation family forms, each alternative disregards the autonomy of family members themselves to determine the patterns of their own collective existence. Thus, although the primary caregiver approach at least looks to the context of family relationships to select the custodial parent, it forces post-separation custody arrangements into a rigid framework of sole custody. In so doing, it disregards the complex web of human relationships that constitute each actual family, and contradicts the contextual and relational conception of justice that we believe is essential to the fair solution of concrete custody disputes.²⁹⁶ So too, contemporary joint custody legislation envisions an inflexible model of pure shared custody, in which each parent holds an equal right to decisions regarding the child's upbringing and children spend equal time with each parent. Here, family context and real relationships are ignored entirely so that children *qua* property may be equally divided between separating parents *qua* abstract rights-bearers.²⁹⁷

Consequently, while joint custody and the primary caregiver principle each embody a vision of justice, in each case these visions are sadly incomplete. Nevertheless, to the extent that both anticipate a more comprehensive notion of justice in the context of custody disputes, they merit careful examination.

PRIMARY CAREGIVER PRESUMPTION

The primary caregiver presumption is of particularly recent judicial creation. First enunciated by the Supreme Court of West Virginia in the 1981 case of *Garska v. McCoy*,²⁹⁸ the rule has since been adopted by the Supreme Court of Minnesota,²⁹⁹

294. *Infra*, notes 323-325, 327-330 and accompanying text.

295. *Infra*, notes 316-322, 383-384 and accompanying text.

296. *Infra*, notes 355-365 and accompanying text.

297. *Infra*, notes 399-414 and accompanying text.

298. 278 S.E.2d 357 (W. Va. 1981) [hereinafter *Garska*].

299. *Pikula v. Pikula*, 374 N.W.2d 705 (Minn. 1985) [hereinafter *Pikula*].

and has been employed somewhat less emphatically by courts in Oregon, California and Pennsylvania,³⁰⁰ and in at least four recent Canadian decisions.³⁰¹ As stated by the Chief Justice of the West Virginia Supreme Court of Appeals, the presumption establishes "an explicit and almost absolute preference" for sole custody by the parent who:

(1) prepares the meals; (2) changes the diapers and dresses and bathes the child; (3) chauffers the child to school, church, friends' homes and the like; (4) provides medical attention, monitors the child's health, and is responsible for taking the child to the doctor; and (5) interacts with the child's friends, school authorities, and other parents engaged in activities that involve the child.³⁰²

Once selected, the custodial parent becomes "primarily responsible for making decisions concerning the child and for providing the child's permanent home."³⁰³ The non-custodial parent, on the other hand, is typically granted "liberal visitation rights, including the right to have the child during holidays, part of the summer, and some weekends."³⁰⁴

Among adherents, the rule has been justified on procedural and substantive grounds, for which the immediate objectives are further rationalized according to both welfare-oriented and justice-based considerations. First, procedurally, the strength of the presumption increases the extent to which the outcomes of most custody actions may be predicted in advance.³⁰⁵ On welfare principles, this certainty reduces the likelihood of disputes going to trial,³⁰⁶ thereby protecting children as a whole from the possibility of injury from potentially bitter, costly, and protracted custody litigation.³⁰⁷ From the perspective of justice, this approach advances gender equality both in the gender-neutral form of the rule itself,³⁰⁸ and in the marked tendency of a more determinate standard to lessen the opportunities for fathers to

300. Marcia O'Kelly, "Blessing the Tie that Binds: Preference for the Primary Caretaker as Custodian" (1988), 63 N. Dak. L. Rev. 481 at 514-16.

301. *Grills, supra*, note 208 at 394; *Bosch v. Bosch supra*, note 261; *Menage v. Hedges* (1986), 8 R.F.L. (3d) 225 at 238-41 (Ont. U.F.C.); *Harden v. Harden* (1987), 6 R.F.L. (3d) 147 at 151 (Sask. C.A.).

302. Richard Neely, "The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed" (1985), 3 Yale L. & Pol'y Rev. 168 at 180.

303. *Ibid.* at 182.

304. *Ibid.*

305. *Ibid.* at 181-82. See also Martha Fineman, "Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking" (1988), Harv. L. Rev. 727 at 772.

306. See, e.g., Mnookin, *supra*, note 1 at 262; and Elster, *supra*, note 248 at 24.

307. *Garska, supra*, note 298 at 361.

308. This feature of the rule has been emphasized by several proponents. See, e.g., Nancy D. Polikoff, "Gender and Child-Custody Determinations: Exploding the Myths" in Irene Diamond, ed., *Families, Politics and Public Policy: A Feminist Dialogue on Women and the State*, (New York: Longman, 1983) at 196; Neely, *supra*, note 302 at 180; Sheila M. Holmes, "Imposed Joint Legal Custody: Children's Interests or Parental Rights?" (1987), 45 U.T. Fac. L. Rev. 300 at 321-23.

threaten legal action as a means of extracting out-of-court concessions from primary caregiving mothers.³⁰⁹

Second, substantively, the presumption ensures that custody will generally be granted to the parent who has devoted more time and energy to the care of the children than has the other parent. In the interests of children, this result attempts to place children with the parent whose past caregiving role is assumed to establish a reliable basis for predicting future superiority as a parent,³¹⁰ preserves the close emotional bonds between children and primary caregiving adults,³¹¹ and protects children in general from the risk of psychological or material harm said to result from arrangements of shared physical custody³¹² and court-ordered joint legal custody.³¹³ In terms of substantive fairness, more than one commentator has justified sole custody to the primary caregiver as "a reward for past caretaking behavior."³¹⁴

Procedural Basis

On procedural grounds alone, there appears to be little to oppose in the primary caregiver rule. Notwithstanding the promulgation of statutory guidelines and the emergence of a judicially created *status quo* presumption, the imprecision of the prevailing best interests test undoubtedly contributes to the frequency and duration of custody litigation and to the unequal bargaining position of separated and divorced mothers. As a gender-neutral means of increasing the determinacy of custody determinations, therefore, a strong primary caregiver presumption represents a noticeable improvement upon the current regime. In addition to the benefits it confers on the process of litigation and out-of-court bargaining, by confining the scope of judicial discretion, such an approach should also reduce the potential for judges to resolve custody disputes on the basis of alien values concerning appropriate methods of childrearing and family life generally.³¹⁵

Nevertheless, these advantages of determinacy and judicial restraint should not be overstated. First, the presumption fails to provide a clear result where both parents have shared child care (either concurrently or for different periods of time) on a relatively equal basis. It is not enough merely to suggest that such cases will be infrequent given current childrearing patterns,³¹⁶ nor that parents will invariably agree wherever both have functioned as true "primary caregivers."³¹⁷ Where the parents *have* shared caregiving responsibilities and where they are *not* able to agree upon post-separation custody arrangements, a decision must be reached. On these

309. *Garska, supra*, note 298 at 362.

310. *Ibid.* at 364.

311. See, e.g., *Pikula, supra*, note 299 at 711.

312. See, e.g., *Neely, supra*, note 302 at 183.

313. See, e.g., *Goldstein, supra*, note 33 at 55; *Neely, supra*, note 302 at 183.

314. *Fineman, supra*, note 305 at 771. See also *Polikoff, supra*, note 308 at 196.

315. See, e.g., *Neely, supra*, note 302 at 181; and *Boyd, supra*, note 13 at 30.

316. See, e.g., *Neely, supra*, note 302 at 180.

317. See, e.g., *Fineman, supra*, note 305 at 773.

occasions, it seems, the court is left only with the costly, lengthy, and invasive approach of individualized "person-oriented" determinations in "the best interests of the child."³¹⁸

Second, to the extent that the primary caregiver principle operates as a mere presumption with respect to the actual custody arrangement that best serves the interests of the child, the court retains ultimate discretion to overlook the rule where its own conception of the child's best interests dictates an alternative outcome. While the *Garska* decision established an especially strong presumption, rebuttable only upon a demonstration of parental unfitness or in accordance with the wishes of older children, others favour weaker presumptions that would leave significantly greater discretion in the hands of the presiding judge.³¹⁹ Moreover, even where the jurisdiction adopts a strong presumption, the court may embrace an expansive definition of primary caregiving, or of parental unfitness, in order to achieve a desired result.³²⁰ Regardless of its final form, therefore, the primary caregiver approach retains a considerable measure of indeterminacy and thus fails to eliminate the existing judicial discretion to apply alien norms and values in the resolution of custody disputes.

Third, a simple preference for the primary caregiver runs into problems where the children reside with the secondary caregiver following separation. Should the rule apply only to pre-separation child care arrangements, or also to those adopted in the post-separation period? To the extent that the presumption is rationalized as a means of ensuring continuous care by the child's "psychological parent" the latter approach would appear to be preferable.³²¹ On the other hand, where primary caregiving is viewed as presumptive evidence of future parenting ability, an emphasis upon pre-separation child care responsibilities may be more desirable. Similarly, since judicial consideration of post-separation arrangements introduces the same incentives for strategic behaviour on the part of parents as does the *status quo* presumption, the interests of children as a whole seem to favour the former approach. So too, where the rule is viewed primarily as a means of furthering women's autonomy to freely terminate bonds of marriage or cohabitation, and to bargain fairly for economic rights of support and property division, a rule that diminishes the significance of post-separation events is undoubtedly superior.³²² On the other hand, where justice is conceived as a "reward" for past caregiving activity, it would presumably be wrong to consider only nurturing carried out prior to separation. Thus, since the numerous rationales for the rule fail to indicate a conclusive approach, the court retains considerable latitude to apply both primary caregiving and *status quo* presumptions in

318. According to Richard Neely, the West Virginia courts, when faced with such a scenario, "hold hearings to determine which parent would be the better single parent." Neely, *supra*, note 302 at 180.

319. See, e.g., O'Kelly, *supra*, note 300 at 534-37.

320. *Ibid.* at 534.

321. *Ibid.* at 542-44.

322. See, e.g., Boyd, *supra*, note 13 at 38-39.

selecting the custodial parent. Again, therefore, the primary caregiver rule is both less determinate and more discretionary than initially assumed.

Substantive Basis

It is the substantive basis of the primary caregiver presumption that is cause for our greatest concern. While past parenting experience, close emotional bonds, and above all justice in the context of family disputes all demand special recognition of primary caregiving relationships in post-separation custody arrangements, contemporary versions of the primary caregiver approach remain firmly committed to a traditional image of the natural family as a private sphere insulated from legal regulation, in which one person is primarily responsible for the care of children, where parental authority must be absolute, and where children can in their own best interests tolerate only one "psychological parent." In this respect, our objection to the primary caregiver rule is not a criticism of its effort to contextualize the custody decision, but instead of its rigid adherence to a traditional model of sole custody (albeit with liberal access to the non-custodial parent).

Welfare Considerations While the principal reason for this sole custody presumption is the belief, associated with the work of Goldstein, Solnit and Freud, that children risk psychological harm where parental authority is shared among two or more persons and subject to regulation by law,³²³ surprisingly little evidence has been adduced to support this assertion.³²⁴ On the contrary, much contemporary psychological theory calls into question children's assumed needs for an isolated and authoritarian nurturing environment.³²⁵ So too, a growing body of research has begun to document the many ways in which children's welfare is actually endangered by orders for sole custody.³²⁶

With respect to the allegedly "universal" requirement for "direct, intimate, and continuous care" of children by autonomous parents, cross-cultural research reveals this assumption itself as little more than a reflection of traditional patterns of childrearing characteristic of modern industrial societies. Specifically, while Goldstein et. al. abandon the gender bias of earlier maternal attachment theories, they retain as "natural" and necessary to children's developmental needs the culturally specific institution of the private family secluded from regulation by law. Consequently, inasmuch as the sole custody presumption is predicated on theories of

323. *Supra*, notes 159-166 and accompanying text.

324. The absence of empirical evidence for these conclusions has been noted by more than one critic. See, e.g., Schwartz, *supra*, note 53 at 230-31; Judith Ryan, "Joint Custody in Canada: Time for a Second Look" (1986), 49 R.F.L. (2d) 119 at 131.

325. For a brief overview of this research, see Roche, *supra*, note 58 at 15-20.

326. See, e.g., Mavis Hetherington, Martha Cox and Roger Cox, "Effects of Divorce on Parents and Children", in M.E. Lamb, ed., *Nontraditional Families: Parenting and Child Development*, (New Jersey: Lawrence Erlbaum, 1982) 233; Judith S. Wallerstein, and Joan B. Kelly, *Surviving the Breakup: How Children and Parents Cope with Divorce*, (New York: Basic Books, 1980).

children's needs for autonomous parents, the rule merely replicates the structure of childrearing associated with this thoroughly contingent mode of family life. What is more, to the extent that the primary caregiver approach presupposes that children are able to develop emotional attachments to only one parent, this presumption reinforces the still pervasive ideas that children require a single "psychological parent" so that one adult alone must be primarily responsible for the care of each child.³²⁷

Contemporary psychological analysis not only questions traditional assumptions regarding children's capacities for emotional bonding and their needs for autonomous parents, but suggests that this emphasis on family privacy may actually be detrimental to their best interests. Thus, for example, two prominent developmental psychologists report that "morally mature and independent judgment and behavior are facilitated by a pluralistic, as opposed to a monolithic, or anomic, socio-psychological human ecology."³²⁸ Other commentators emphasize that social isolation and absolute parental authority intensify dependency and delay socio-psychological maturation.³²⁹ Thus, as another researcher concludes:

[The] assumption of children's need for autonomous parents lacks any clear empirical base and may be effectively refuted by research suggesting psychological harm of overemphasis on privacy and parental autonomy in childrearing practices.³³⁰

In the context of custody disputes, these findings challenge the child protection justification for a presumption of sole custody. If children are not invariably harmed by the absence of absolute parental authority, court orders for joint legal or physical custody need not necessarily contradict children's best interests. Instead, as several recent studies have discovered, children's welfare may actually be threatened by a sole custody presumption.

First, even where one parent (usually the mother) fulfills the majority of childrearing responsibilities, evidence indicates that children nonetheless develop strong emotional bonds with secondary caregiving parents (typically fathers),³³¹ as well as with other adults who comprise the child's "extended family" of grandparents, relatives and friends.³³² Sole custody to the primary caregiver severs these bonds between the child and the secondary caregiver (as well as with the "extended family" associated with this focal relationship) by granting ultimate decision-making

327. See, e.g., Fran Olsen, "The Politics of Family Law" (1984), 2 *Law and Inequality* 1 at 19; and Katherine T. Bartlett and Carol B. Stack, "Joint Custody, Feminism and the Dependency Dilemma" (1986), 2 *Berkeley Women's L. J.* 9 at 32.

328. James Garbarino and Urie Bronfenbrenner, "The Socialization of Moral Judgment and Behavior in Cross-Cultural Perspective," in Thomas Lickona, ed., *Moral Development and Behaviour: Theory, Research and Social Issues*, (New York: Holt Rinehart and Winston, 1976) 80.

329. See, e.g., Roche, *supra*, note 58 at 17.

330. Gary B. Melton, *Child Advocacy: Psychological Issues and Interventions*, (New York: Plenum, 1983) at 5-6.

331. See, e.g., Chambers, *supra*, note 53 at 533-38.

332. See, e.g., H. Jay Folberg and Marva Graham, "Joint Custody of Children Following Divorce" (1979), 12 *U.C. Davis L. Rev.* 523 at 565.

authority and immediate physical care to the former, leaving the latter only with "residual rights" of access and guardianship.³³³ Although recent legal developments suggest both a greater willingness to enforce access orders³³⁴ and a more expansive interpretation of guardianship rights,³³⁵ there is little doubt as to the message conveyed by a court order for sole custody: the custodial parent becomes the "true" parent, while the non-custodial parent "is relegated to the status of a visiting relative."³³⁶

Consequently, it is hardly surprising that where custodial parents have threatened the existence of continuing relationships between their children and the non-custodial parent, the legal system has been loathe to respond. Despite a noticeable judicial bias against maternal relocation³³⁷ and a marked judicial tendency to uphold *status quo* living arrangements,³³⁸ residential changes by custodial parents are not subject to an explicit standard of reasonableness.³³⁹ Remedies for deliberate obstruction of access have been virtually nonexistent.³⁴⁰ Finally, at least one court has suggested that access can be discontinued where inter-parental conflict generated by the custodial parent causes emotional anxiety for the child.³⁴¹ While these cases are thankfully few, and most custodial parents undoubtedly attempt to accommodate relationships between their children and the non-custodial parent to the best of their abilities, their very existence and the various legal reactions reveal the diminished status of the non-custodial parent in a sole custody arrangement.

The reality of this diminished status is not lost on non-custodial parents themselves. In fact, as more than one study has reported,³⁴² the sense of loss that they experience in being deprived of a meaningful role in their children's lives is so great that they frequently retreat from these relationships in depression and frustration. Moreover, the incidence of this phenomenon is so widespread that it dwarfs the small number of cases in which these relationships are terminated by the deliberate actions

333. *Supra*, note 167.

334. *Supra*, note 171.

335. Recent amendments to federal and provincial legislation expressly provide that the entitlement to access shall include the right "to make inquiries and to be given information as to the health, education and welfare of the child." DA (1985), s. 16(5); CLRA, s. 20(5).

336. Abella, *supra*, note 134 at 469.

337. See, e.g., Katherine C. Sheehan, "Post-Divorce Child Custody and Family Relocation" (1986), 9 Harv. Women's L.J. 135.

338. See, e.g., *Crawford v. Crawford* (1985), 46 R.F.L. (2d) 331 (P.E.I. S.C.); *Smith v. Smith* (1987), 7 R.F.L. (3d) 206 (N.B. Fam. Ct.). See also Dorothy Lipovenko, "Child stability more important than parental bond, court rules," *Globe & Mail* (17 March 1989) A3.

339. See, e.g., *Wickham v. Wickham*, (1983), 35 R.F.L. (2d) 448 (Ont. C.A.); *Landrey v. Lavers* (1985), 45 R.F.L. (2d) 235 (Ont. C.A.). This is not to defend the approach of several American jurisdictions, in which a right of consent to relocation grants an effective veto power to non-custodial parents, and preserves a *status quo* that may have been established by an unequal process of decision-making during cohabitation and/or may no longer reflect a fair arrangement for physical custody.

340. See, e.g., *Frame v. Smith*, *supra*, note 170.

341. *Rutherford v. Rutherford* (1986), 4 R.F.L. (3d) 457 (B.C.S.C.).

342. See, e.g., Judith Brown Grief, "Access: Legal Right or Privilege at the Custodial Parent's Discretion" (1980), 3 Can. J. Fam. L. 43.

of the custodial parent. While some have blamed indifferent fathers for this result,³⁴³ it would be wrong to identify this effect with fathers alone, and to ignore both the context in which these decisions to withdraw are made and the role that the legal system plays in establishing this context. Above all, sole custody effectively terminates the non-custodial parent's status as a parent, and restricts parent-child relationships to the artificial structure of mere "visitation."³⁴⁴

While this consequence has obvious implications for the welfare of the non-custodial parent, of paramount concern under the prevailing best interests test is the impact of this relational loss upon the child. In this respect, researchers have noted both emotional and economic injury. With respect to the former, an order for sole custody has been analogized to the death of the excluded parent.³⁴⁵ As Jay Folberg and Marva Graham report, researchers have uniformly found that "*the key variable affecting satisfactory adjustment of children following divorce is the extent of continuing involvement by both parents in child rearing.*"³⁴⁶ With respect to the latter economic injury, studies indicate a significant correlation between the degree of contact between children and fathers and the extent to which they fulfill child support obligations.³⁴⁷ While it would clearly amount to legally sanctioned blackmail to order joint custody solely to address this deficiency, from the perspective of the welfare of the child, it appears, it would be equally wrong to ignore this factor.

At the same time, as sole custody weakens children's relationships with non-custodial parents, it increases their dependency on the custodial parent. To the extent that custodial parents typically experience considerable personal and financial pressure in the adjustment to single parenting,³⁴⁸ this result can have immediate adverse consequences for the child. Thus, Judith Wallerstein and Joan Kelly report a serious deterioration in the relationship between children and custodial mothers in the first year after divorce.³⁴⁹ More generally, primary dependence on one parent increases the child's emotional and economic vulnerability. With respect to the former, Sheila Schwartz explains:

This can cause overinvolvement in the life of that parent and an exaggerated fear of what would happen if that parent were also to be "lost." Such a loss could be real as in death or illness or an imagined loss to a job, dating or remarriage.³⁵⁰

343. See, e.g., Fineman, *supra*, note 305 at 759.

344. Folberg and Graham, *supra*, note 332 at 555-56.

345. Edward J. Rosen, "Joint Custody: In the Best Interests of the Child and Parents" (1978), 1 R.F.L. (2d) 116 at 120.

346. Folberg and Graham, *supra*, note 332 at 535 [emphasis in original].

347. See, e.g., David L. Chambers, *Making Fathers Pay: The Enforcement of Child Support* (Chicago: University of Chicago Press, 1979); and Jessica Pearson and Nancy Thoennes, "Supporting Children After Divorce: The Influence of Custody on Support Levels and Payments" (1988), 22 Fam. L.Q. 319.

348. This adjustment is particularly difficult where the custodial parent is the primary caregiver and has either withdrawn from the labour market or sacrificed advancement to fulfill the responsibilities of primary caregiver. See, e.g., Polikoff, *supra*, note 308 at 189.

349. Wallerstein and Kelly, *supra*, note 326 at 108-20.

350. Schwartz, *supra*, note 53 at 231.

With respect to the latter economic insecurity, the death or illness of the custodial parent could be devastating.

Finally, the sole custody presumption works against the interests of children as a whole by encouraging an adversarial approach to post-separation custody arrangements, in which there are "winners" and "losers," and where one parent experiences this loss as an especially severe blow. Not only does this increase the antagonism and indeed the likelihood of custody disputes in general,³⁵¹ but it also encourages strategic behaviour on the part of parents to establish a stronger custody claim.³⁵² This, in turn, discourages the selection of interim custody arrangements in the best interests of the child, and may operate to reward child abduction. Equally troubling, the "winner-takes-all" approach of the sole custody determination eliminates any incentive for the parents themselves (with or without the assistance of a mediator) to develop methods of cooperation and conflict resolution to govern their future interaction.³⁵³ Even in an arrangement of sole custody, to the extent that the non-custodial parent maintains a relationship with the child, some continued association with the custodial parent is inevitable. The language and structure of sole custody, however, create the illusion that parental separation can accomplish a "clean break" notwithstanding the children. As a result, it is not surprising that researchers have discovered a significantly higher rate of relitigation among sole custody arrangements than in joint custody structures and in custody formations arrived at through mediation.³⁵⁴

Justice If the welfare justification for a presumption of sole custody to the primary caregiver cannot be sustained, its defenders are left only with the assertion that the substantive outcome achieved by such a rule satisfies some criterion of justice in the context of custody disputes. In this respect, we have seen, such a result has been characterized as a "reward" for past caregiving behaviour. Ignoring for the moment the unfortunate proprietorial conception of children that this expression conveys, as a standard of justice in the family context this approach does have some initial appeal. Rather than looking beyond the family for external norms of justice (or welfare) to resolve custody determinations, a primary caregiver rule contextualizes the custody decision by looking to each parent's relationship with the child to arrive at a fair result in the context of the specific dispute before the court. Furthermore, it examines positive contributions for the development of the child, rather than abstract authority over the child, as the basis for elaborating parental rights to govern the outcomes of concrete custody disputes. In each respect, it adopts the relational and contextual approach that we believe is necessary to the just resolution of intra-familial disputes.

351. See, e.g., Folberg and Graham, *supra*, note 332 at 549.

352. *Ibid.* at 558-59.

353. *Ibid.* at 536.

354. See, e.g., F.W. Ilfeld, Jr., H.Z. Ilfeld, and J.R. Alexander, "Does joint custody work? A first look at outcome data of relitigation" (1982), 139 *Am. J. Psychiat.* 62; Howard H. Irving and Michael Benjamin, *Family Mediation: Theory and Practice of Dispute Resolution*, (Toronto: Carswell, 1987) at 239. On the other hand, these studies tend to be biased to the extent that only more cooperative parents would select joint custody and/or mediation in the first place.

Nevertheless, despite this positive beginning, at this very instant of contextualization, the primary caregiver approach simultaneously draws back from the complex web of actual family relationships so that it may isolate one (undoubtedly strong) relationship (that of the child and the primary caregiver) to the virtual exclusion of all others. Relationships between the child and the secondary caregiver, and between the child and anyone else, are momentarily ignored so that the legal system may take firm hold of this single (most substantial) fibre as the basis for its award of sole custody to the primary caregiving parent.

Although this approach is at least understandable (if not defensible) where the law assumes that the welfare of the child imposes the constraint that only one relationship may be adequately preserved, absent such an explicit child protection rationale, it is difficult to see what principle can explain the decision to exclude any other relationship from consideration. Martha Fineman, however, advances such a rationale in the "clean break" philosophy of contemporary legislation governing marriage breakdown.³⁵⁵ Here, she notes, the legal system attempts to facilitate not the continuation and rearrangement of spousal relationships, but instead "an end or termination of a significant interaction":

... a division, distribution, or allocation of things acquired during marriage – an emancipatory model – and with its "ending," the permission for a "new life" for the participants and the withdrawal of active legal interference in their relationship.³⁵⁶

Applied to custody determinations, this paradigm necessarily requires an order for exclusive custody, so that each parent may be released from continued association with the other and liberated from "active legal interference" in their lives. One parent-child relationship, therefore, must take precedence over the other.³⁵⁷ In this respect, the primary caregiver rule merely supplies the distributive criterion (based on the instrumental objective of encouraging nurturing and concern for children³⁵⁸) by which this selection may be made.

While Fineman's account is certainly intriguing, it is hardly convincing. To begin with, the theory itself cannot account for the persistent legal recognition of access between the child and the non-custodial parent. In this well-established legal practice, a principle of relational continuity, rather than that of the "clean break," is clearly operative. More generally, despite its purported feminism, the distinctly liberal framework of Fineman's "emancipatory model" fails to appreciate the complex web of human relationships that constitute the family, and thus in turn fails to comprehend the intricate character of concrete custody disputes. For Fineman, the only

355. Fineman, *supra*, note 305.

356. *Ibid.* at 756.

357. As a result, the clean break approach creates a powerful incentive to exaggerate one set of parent-child relationships and to deprecate the significance of the other. Notwithstanding the undeniably gendered reality of most contemporary childrearing, this tendency is apparent in the very language of "primary" and "secondary" caregiving.

358. Fineman, *supra*, note 305 at 773-74.

"significant [family] interaction" is that between each parent. Children are viewed not as independent persons with whom each parent is connected through a distinct set of personal bonds, but as possessions in whom each parent is entitled to a particular claim based on their own respective nurturing roles.³⁵⁹ Finally, since the family itself is identified solely with the contractual link between the parents, this institution necessarily disappears once this constitutional union is terminated. All that remains is to "divide, distribute and allocate" the "things acquired" during the period of cohabitation: the stocks, the bonds, the furniture, the children.

On the more contextual analysis of the family developed here, children are conceptualized as persons, not things, with whom both parents individually, as well as together, develop a series of mutually sustaining and interconnected relationships. When parents choose to separate, these independent bonds between parents and children remain, so that separation itself terminates only the spousal connection, but not the relationships that otherwise constitute the family. While the parents themselves may resist continued contact with one another, to the extent that each set of parent-child relationships is to endure, the parents must of necessity maintain some connection with one another. Thus, to speak of a "clean break" is clearly illusory. Instead, the primary function³⁶⁰ of the legal system in the context of a custody dispute is to assist in the process of restructuring the family form so that relational termination between the spouses may be accommodated to relational continuity between parents and children.

In this highly contextual exercise it is obviously not enough merely to single out one relationship (between the child and the primary caregiver) as the only bond worthy of legal recognition. On the contrary, children's relationships with secondary caregivers, as well as with third parties such as grandparents and social parents, may also be deserving of legal protection. In each case, however, the just solution to a given custody dispute cannot be sought in rigid categories (whether primary nurturing or biological connection), but requires a sensitive evaluation of the nature and intensity of each adult's relationship with the child, and of the child's own capacity for independent choice.

Above all, it is mistaken to assume that primary caregiving by one parent necessarily overshadows any bond between the child and the other parent. Although the secondary caregiver has by definition not developed as close a physical relationship with the child as has the primary caregiver, his (typically) relationship with the child may be far from negligible.³⁶¹ In a traditional family arrangement, for

359. Despite her criticism of this proprietary conception of children in arguments for joint custody, Fineman finds it useful to employ the "property metaphor" to describe the position of children in custody determinations, and implicitly employs such a conception in conceiving of children as "rewards." *Ibid.* at 737, 771.

360. We speak of this function as "primary" to emphasize that child protection remains an important, but subsidiary function in specific custody determinations.

361. In this respect, it should be noted, we do not speak in generalizations regarding the relationships of most secondary caregivers and their children. In the contextual model advanced here, it is the actual character of the concrete relationship, not an abstract category defined by prevailing societal patterns, that matters to the analysis.

example, the mother may have been entirely responsible for cleaning, cooking, bathing, feeding, and dressing the child, while the father may have chauffeured the child to school and social activities and taken primary responsibility for the child's educational and religious upbringing.³⁶² To grant sole custody to the "primary" caregiving mother would be both to ignore the important contribution of the father's "secondary" caregiving and to annul the significant relationship that this interaction has established between the father and the child.³⁶³

Even where a father has had very little physical association with the child, one would want to look carefully at the family context to determine the fair solution to a specific custody dispute. Thus, for example, where the father works on an oil rig so that he may provide a "better life" for his children and retains a keen interest and involvement in their upbringing despite his physical separation for extended periods of time, it would surely be wrong to dismiss the relationship between the children and this "primary breadwinner" as insignificant or unrelated to the care of the children. Certainly, an order for "primary residence" to the mother seems justified on these facts; but to categorically terminate the father's relationship with the children, reducing him to a mere visitor with no meaningful role in the children's lives, appears equally unjust to both the father and to the children.

From the perspective of justice, therefore, the primary caregiver rule appears unacceptably crude. Not only does the rule neglect the legitimate interests of secondary caregivers to continued relationships with their children, it also ignores the equally substantial interests of children to continued relationships with secondary caregivers. So too, to the extent that it disregards children's own wishes, it ignores their steadily increasing capacity for self-determination. What is more, absent an existing dispute over a specific aspect of the child's upbringing (e.g. education or religion), parental separation itself demands no more than a decision on the child's residential arrangements.³⁶⁴ While the primary caregiver represents the obvious candidate for the child's primary residence, there is simply no need nor justification to

362. By using the term "responsibility," rather than decision-making authority, we intend that this function involved more than mere directives to the mother regarding school and religion. On the contrary, responsibility suggests an active role *with* the child and the child's social environment, taking the child to school, helping with assignments, meeting with the child's teachers, worshipping with the child.

363. This, of course, is not to suggest that the father be granted sole or "ultimate" decision-making authority in matters of education and religion for which he was primarily responsible during the period of cohabitation, nor that past arrangements be frozen into a perpetual *status quo*. A contextual approach to family justice requires that custody arrangements be flexible so that they may accommodate changing values and patterns of childrearing. Thus, where the separation is inspired by or inspires a greater interest on the part of the mother for active participation in the educational and religious life of the child, this interest should be reasonably accommodated by the father and the child, taking into account the context in which the original arrangements were established and the patterns adopted in the interim. Similarly, where the father seeks greater involvement in the nurturing activities which were formerly her exclusive domain, this desire should not be categorically dismissed by virtue of the mother's past caregiving nor by the establishment of a corresponding *status quo*.

364. For similar recommendations that "custody" awards be replaced by "residency" orders, see Abella, *supra*, note 134 at 470; Maidment, *supra*, note 73 at 280; and Ryan, *supra*, note 324 at 148.

adopt a rigid rule of sole custody that would effectively terminate the other parent's status as a parent.³⁶⁵

JOINT CUSTODY

In contrast to the judicial creation of a primary caregiver presumption, the development of legal rules favouring joint custody on divorce or separation has been almost entirely legislative. Beginning with California in 1979, most American states have now adopted some form of joint custody legislation, ranging from mere recognition of joint custody as a judicial option,³⁶⁶ to statutory presumptions favouring joint custody where the parents agree,³⁶⁷ to provisions permitting a court to order joint custody upon the request of only one parent,³⁶⁸ to legislation making joint custody the first arrangement considered by the court regardless of any agreement by the parents,³⁶⁹ and finally to explicit presumptions in favour of joint custody notwithstanding the views of the parents.³⁷⁰

While no Canadian jurisdiction has enacted a presumption favouring joint custody, recent amendments to federal and provincial legislation expressly recognize the possibility of such an order.³⁷¹ More significantly, a private member's Bill (Bill 95) currently before the Ontario Legislature³⁷² would establish an explicit presumption that, regardless of the order sought by either parent, "joint custody of the child by both parents is in the best interests of the child."³⁷³ Where such an order is made, the Bill continues:

... each parent shall have equal rights and responsibilities with respect to the physical,

365. Of course, child abuse or spousal assault represent independent grounds for termination of parental rights — grounds which we do not address in this paper, not because we question the prevalence of such conduct (we don't) but because these cases pose separate issues of criminality and child protection, from which we wish to distinguish "hard cases" of disputed custody in the absence of such independent grounds.

366. See, e.g., Alaska Stat., s. 25.20.060(c) (1982); Ind. Code Ann., s. 31-1-11.5-21(f) (West Cum. Supp. 1984-85); Iowa Code Ann., s. 598.21.6 (West 1981); Ky. Rev. Stat., s. 403.270(3) (1984); Minn. Stat. Ann., s. 518.003, .17 (West Cum. Supp. 1984); N.C. Gen. Stat., s. 50-13-2(b) (1976); Or. Rev. Stat., s. 107.105(1)(a) (1977).

367. Cal. Civ. Code, s. 4600.5(a) (West 1983); Conn. Gen. Stat. Ann., s. 46b-56a(b) (West 1984); Me. Rev. Stat. Ann., s. 214 (1981); Miss Code Ann., s. 93-5-24(4) (Supp. 1984).

368. Cal. Civ. Code, ss. 4600, 4600.5 (West 1980); Hawaii Rev. Stat., ss. 571-46, -46.1; Mich. Comp. Laws Ann., s. 722.23(6a) (West Supp. 1984-1985); Miss. Code Ann., s. 93-5-25 (Supp. 1984); Mont. Rev. Code Ann., s. 40-4-222-25 (1983); Okla. Stat. Ann., tit. 12, s. 1275.4 (West Cum. Supp. 1984-1985); Pa. Stat. Ann., s. 1005 (Purdon 1966).

369. Kan. Stat. Ann., s. 60-1610(a)(4)(A) (1983); N.M. Stat. Ann., s. 40-4-9.1(A) (1978).

370. La. Civ. Code Ann. art. 146(C) (West Supp. 1984) ("rebuttable presumption that joint custody is in the best interest of a minor child"); Idaho Code, s. 32-717B(4) (West Supp. 1982) (denial of joint custody must be based on a "preponderance of the evidence" that it would not be in the best interest of minor children); Fla. Stat., s. 61.13(2)(6)(2) (1982 Supp.) (shared custody unless court finds this to be "detrimental to the child").

371. DA (1985), s. 16(4); CLRA, s. 28(a).

372. Bill 95, *An Act to Amend the Children's Law Reform Act*, 1st Sess., 34 Leg. Ont., 1988 (1st Reading, February 8, 1988) [hereinafter Bill 95].

373. *Ibid.*, s. 1(1) [proposed CLRA, s. 20(1a)].

mental, moral and emotional well-being of the child, including the making of decisions about the child's education, health care and religious training and, where practicable, the child shall reside with each parent for an equal period of time.³⁷⁴

Thus, the Bill contemplates joint legal (decision-making) and joint physical (residential) custody as the general rule in all custody disputes.

As with the primary caregiver presumption, both procedural and substantive reasons are typically advanced for such a joint custody presumption, each of which is further rationalized in terms of child welfare and justice-based considerations. Thus, it is argued, a clear preference for shared custody will dramatically reduce incentives for strategic behaviour by either parent both in attempting to establish a stronger custody claim and in negotiating custody arrangements "in the shadow of the law."³⁷⁵ As already explained, this procedural determinacy should advance the welfare of children as a whole by reducing the expected frequency of custody litigation and by eliminating disincentives to the selection of interim custody arrangements in the best interests of the child. So too, aside from the substantive content of the presumption,³⁷⁶ the certainty of its outcome tends to equalize the negotiating process by eliminating the bargaining advantages otherwise enjoyed by the least risk-averse party. Finally, to the extent that a clear statutory presumption narrows the scope for judicial discretion, such a rule enhances individual and family autonomy by minimizing the opportunity for judges to decide custody disputes according to their own conceptions of proper childrearing practices or appropriate family life.³⁷⁷

Substantively, joint custody provides that "parenting responsibilities and privileges" continue despite parental separation or divorce.³⁷⁸ In the interests of children, this result is said to ensure the emotional and economic advantages of continued relationships with both parents,³⁷⁹ to prevent the child's dependency on the otherwise sole custodial parent, and to encourage parental cooperation both in establishing post-separation custody arrangements and in handling subsequent association made necessary by the continuation of parent-child relationships.³⁸⁰ As a principle of justice, the presumption is said to further gender equality,³⁸¹ and to preserve what some consider to be the fundamental rights of each parent to equal custody of their children.³⁸²

374. *Ibid.* s. 1(2) [proposed CLRA, s. 20(2a)].

375. See, e.g., Schwartz, *supra*, note 53 at 243.

376. Of course, relative to a primary caregiver presumption, a joint custody rule tends to disadvantage women as a whole by depriving them of what might otherwise represent a considerable legal "endowment": sole custody of the children. See, e.g., Fineman, *supra*, note 305 at 761.

377. See, e.g. Bartlett and Stack, *supra*, note 327 at 25-26.

378. Jim Henderson, "Two are better than one," *Globe & Mail* (10 May 1988) A7.

379. See, e.g. Folberg and Graham, *supra*, note 332 at 564-65; Wallerstein and Kelly, *supra*, note 326 at 310.

380. See, e.g. Folberg and Graham, *supra*, note 332 at 551; Schwartz, *supra*, note 53 at 227.

381. See, e.g., Bartlett and Stack, *supra*, note 327 at 32-33.

382. See, e.g., Ellen Canackos, "Joint Custody as a Fundamental Right," in Folberg, *supra*, note 33 at 225; Holly L. Robinson, "Joint Custody: Constitutional Imperatives" (1985), 54 Cinn. L. Rev. 27.

Procedural Basis

For the very reasons of child welfare, fair bargaining and family autonomy just cited, an explicit preference for shared custody represents a clear improvement upon the current method of open-ended custody determinations based on the best interests of the child. In fact, to the extent that a shared custody rule avoids the difficult task of choosing between two parents and eliminates any incentive for parents to engage in post-separation strategic behaviour to establish a *status quo* claim, joint custody appears to promise noticeable procedural advantages over a presumption favouring sole custody to the primary caregiver.

Nevertheless, as with the primary caregiver presumption, the actual magnitude of these gains remains quite limited so long as the shared custody principle represents a mere presumption as to the specific custody arrangement which best advances the welfare of the child. In Bill 95, for example, the statutory presumption is rebuttable wherever "evidence to the contrary" persuades the court that joint custody would not be in the best interests of the child.³⁸³ In determining these best interests, moreover, the court is to consider a set of statutory guidelines only slightly different from the current open-ended criteria.³⁸⁴ Consequently, the proposed reform continues to admit considerable judicial discretion, thereby frustrating precisely those objectives of determinacy and judicial restraint that proponents commend as potential advantages of the presumption.

Substantive Basis

As with the primary caregiver approach, however, our principal concerns with a legislative presumption of shared custody are substantive. On welfare grounds, although a joint custody rule may represent some improvement upon a regime of sole custody, the evidence to this effect is nowhere certain. In any event, by contemplating court-ordered shared custody as a general principle, the very essence of the rule contradicts the child protection rationale for making the best interests of the child the paramount consideration in every custody dispute. If parental inability to agree upon specific aspects of the legal or physical custody of the child does not itself pose substantial risks to the psychological well-being of the child, custody disputes should be resolved according to principles of private dispute-settlement rather than child protection.

From the perspective of justice, however, a statutory preference for shared custody is considerably worse than a rule favouring sole custody to the child's primary caregiver. While the latter fails to adequately account for the contextual and relational character of concrete custody disputes, the former disregards considerations of context and relations altogether.

Welfare Considerations As with the procedural basis for a presumption of joint

383. Bill 95, s. 1(1) [proposed CLRA, s. 20(1a)]. The Bill would also require the court to "state in its reasons for judgment the findings of fact upon which it has determined that the presumption is rebutted." *Ibid.* s. 3 [proposed CLRA, s. 28(2)].

384. *Ibid.* s. 2 [proposed CLRA, s. 24(2)].

custody, little need be said here about the welfare rationale for the substantive outcome of shared custody, since these reasons have been surveyed already in responding to the sole custody principle embodied in the primary caregiver approach. A considerable body of research suggests that children benefit from continued relationships with both parents following separation or divorce. Consequently, as one commentator has written, joint custody "may provide the most effective method of implementing the states' paramount public policy interest – the protection of the best interests of the children of divorced [or separated] parents."³⁸⁵

On the other hand, critics and skeptics of court-ordered joint custody have recorded numerous reservations concerning the optimistic picture portrayed by its advocates. First, feminists have questioned the extent to which formal joint custody orders will ensure meaningful shared parenting following separation. Instead, it is argued, "joint" custody is more likely to involve primary parenting by mothers with equal decision-making by fathers.³⁸⁶ While this result is mainly criticized as unjust, inasmuch as it does not relieve primary caregivers of the tangible burdens of *de facto* single parenthood but instead imposes upon them the additional hindrance of joint decision-making, the additional pressure of such an arrangement may have adverse consequences for the welfare of the child. What is more, where courts decrease child support obligations on the assumption that formal joint custody means actual shared financial obligations, a presumption of shared custody may undermine children's economic interests, as well as their emotional interests.³⁸⁷

More generally, critics have questioned the alleged benefits to the child of both joint physical custody and joint legal custody. With respect to the former, research has disclosed some evidence of emotional disruption due to frequent residential changes.³⁸⁸ So too, actuarial analysis has documented the added financial burden of maintaining two "primary residences" for the child.³⁸⁹ While several empirical studies of joint physical custody arrangements report "few problems of adjustment and high degrees of satisfaction,"³⁹⁰ these involve primarily middle class families with adequate resources to manage dual living arrangements.³⁹¹ With respect to joint legal custody, although several authors have noted a marked decline in parental hostility during the first year after separation,³⁹² an ability of most parents to separate

385. Robinson, *supra*, note 382 at 32-33.

386. See, e.g., Holmes, *supra*, note 308 at 312-18; and Fineman, *supra*, note 305 at 759.

387. See, e.g., Renee Joyal-Poupart, "Joint Custody," in Elizabeth Sloss, ed., *Family Law in Canada: New Directions*, (Ottawa: Canadian Advisory Council on the Status of Women, 1985) at 117-18. On the other hand, recent empirical investigation suggests that this phenomenon has not resulted in economic hardship to mothers and children in joint custody arrangements, but instead reflects "the more equitable and substantial income statuses of divorcing parents who opted for [joint] custody." Pearson and Thoennes, *supra*, note 347 at 335.

388. See, e.g., Alice Abarbanel, "Shared Parenting After Separation and Divorce: A Study of Joint Custody" (1979), 49 *Am. J. Orthopsychiatry* 320 at 328; Susan Steinman, "The Experience of Children in a Joint-Custody Arrangement: A Report of a Study" (1981), 51 *Am. J. Orthopsychiatry* 403 at 412-13.

389. Melissa Patterson, "The Added Costs of Shared Lives," in Folberg, *supra*, note 33 at 72.

390. Ryan, *supra*, note 324 at 134.

391. Schwartz, *supra*, note 53 at 237.

392. See, e.g., Joan B. Kelly, "Further Observations on Joint Custody" (1983), 16 *U.C. Davis L. Rev.* 762 at 762-63.

their own inter-personal conflict from their roles as joint custodial parents,³⁹³ and positive benefits to children from continued contact with two psychological parents,³⁹⁴ the research upon which these enthusiastic assessments are based involves overwhelmingly voluntary joint custody arrangements established extra-judicially and without professional assistance.³⁹⁵ In contrast, in three of the four court-ordered joint custody arrangements examined by Susan Steinman, the parents remained "intensely hostile" and the children were "having significant emotional and behavioral problems."³⁹⁶ On the other hand, notes Steinman, these disturbing results relate more to the degree of parental conflict involved (physical violence or verbal abuse) and to the psychological state of the individual parents, than to the fact of court-ordered joint custody itself.³⁹⁷

While these more skeptical evaluations raise serious doubts as to the welfare justification for a legal presumption of joint custody, it is far from clear that sole custody represents a preferable alternative. On the contrary, as already explained, such a result entails its own disadvantages in the form of diminished contact between the child and the non-custodial parent, increased dependency by the child on the custodial parent, and a greater likelihood of parental antagonism and relitigation. In fact, as more than one commentator has pointed out, since sole custody orders typically include provisions for access by the non-custodial parent, children in a sole custody arrangement may experience the same emotional trauma from parental conflict as those subject to a court order for joint (legal and/or physical) custody.³⁹⁸ Furthermore, to the extent that joint custody (and family mediation) may encourage parental cooperation, such conflict might be less frequent in a joint custody regime than in a jurisdiction favouring sole custody. On balance, therefore, a joint custody presumption may further the best interests of more children than a rule favouring sole custody to the primary caregiver.

In reaching this extremely tentative conclusion, however, we by no means endorse contemporary legislative presumptions favouring joint custody in the best interests of the child. On the contrary, as we have already explained, by admitting the possibility (indeed the likelihood) of court-ordered joint custody, such a rule challenges the child protection rationale upon which the welfare principle itself is based. Consequently, if joint custody is to be coherently rationalized as a substantive outcome to actual custody disputes, this must be accomplished according to the justice-based grounds of intra-familial dispute-settlement rather than the welfare-oriented criteria of child protection.

393. See, e.g., Constance Ahrons, "The Continuing Coparental Relationship Between Divorced Spouses" (1981), 51 Am. J. Orthopsych. 415.

394. See, e.g., Abarbanel, *supra*, note 388; and Steinman, *supra*, note 388.

395. Susan Steinman, "Joint Custody: What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications" (1983) 16 U.C. Davis L. Rev. 739 at 743. See also Chambers, *supra*, note 53 at 553.

396. Steinman, *ibid.* at 752.

397. *Ibid.* As already stated, child abuse and spousal assault constitute important and independent bases for the termination of parental rights. *Supra*, note 365.

398. See, e.g., Chambers, *supra*, note 53 at 557; Robinson, *supra*, note 382 at 33.

While this approach may be appropriate for the division of family property upon spousal separation,⁴¹¹ it cannot be blithely transposed to the law of custody. First, by treating children as objects to be equally shared upon parental separation, it ignores their independent interests in residential and relational continuity, as well as their developing capacity for independent choice. Second, by abstracting from the unique context of the actual custody dispute, it forswears the relational analysis that is essential to a thorough explication of justice in the individual case.

Thus, for example, where a traditional father has had little direct involvement with the child, who has been cared for primarily by the mother, a flexible application of the primary caregiver approach has considerably greater appeal than a rigid rule of shared custody. To require the child suddenly to spend equal time with each parent would be to establish a pattern of family life completely at odds with that existing prior to parental separation. Dividing the child "equally" between both parents, such a rule ignores the distinctive character of each parent's relationship with the child, upon which a more contextual notion of family justice depends. According to the latter relational approach, attention to the intensity of the primary caregiver bond requires differential treatment involving primary residence with the mother.⁴¹²

So too, an equal division of "rights and responsibilities" with respect to decisions about the child's upbringing might be unjust in the context of a given dispute. Thus, for example, where the child's religion has been a special concern and exclusive responsibility of one parent alone,⁴¹³ to grant the other a formally equal voice in this area following separation may be inappropriate.⁴¹⁴ In any event, absent a specific

the contracting parents. Thus, the Ontario Bill contemplates a "parenting agreement" by which the parents are to determine: "(a) the period or periods that the child shall reside with each parent; (b) the method by which parents are to reach agreement concerning major decisions about the child's physical, mental, moral and emotional well-being; (c) the method of resolving a disagreement between the parents concerning the child's best interests or the interpretation of the agreement; and (d) the periodic review and renegotiation of the terms of the agreement by the parents." Bill 95, s. 4 [proposed CLRA, s. 29a(2)]. While such an exercise may represent a useful method of helping the family to decide upon post-separation custody arrangements, we have considerable reservations both with the process of private ordering by which this agreement is reached (in which mothers and children are almost always disadvantaged relative to fathers) and with the potential for the contractual paradigm to impose a rigid and unalterable structure upon family relationships. For a persuasive critique of private ordering in this context, see Martha Shaffer, "Divorce Mediation: A Feminist Perspective" (1988), 46 U.T. Fac. L. Rev. 162. For a particularly disturbing example of contractual inflexibility, see Elster, *supra*, note 248 at 45 (proposing that "marrying couples [be given] the option of binding themselves to one custody procedure or another in case they later decide to divorce and find themselves unable to agree on custody").

411. See, e.g., FLA, Part I.

412. On the other hand, where separation stimulates the father to pursue more meaningful relationships with his children, the law should provide flexibility to allow this relational flourishing. Thus, as suggested earlier, the father's wishes should be reasonably accommodated by the mother and the child, taking into account the reasons for his sudden interest, the burdens that this accommodation will impose on the mother and the child, and the wishes of the child. *Supra*, note 363.

413. On our use of the word "responsibility," see *supra*, note 362.

414. We emphasize the conditional "may" in this sentence to indicate the need for further investigation to consider the context in which the child's religion was originally decided. Thus, for example, where the father's religion prevailed over that of the mother on account of a general pattern of unequal (gender-based) decision-making, to grant the father ultimate authority in religious matters would be to ratify the inequality of the original decision.

dispute over a particular aspect of the child's upbringing (which could be properly resolved only in light of the context in which it itself were to arise), there is simply no need to make a formal order respecting the "legal" custody of the child. Consequently, an equal division of decision-making authority is both acontextual and unnecessary.

Conclusion

The contemporary law of child custody is both misconceived and self-contradictory. By emphasizing child protection as the primary purpose of the custody decision, it embodies a traditional conception of the family as a natural (non-legal) domain and thus undermines the autonomy of individual families to determine for themselves the form of their own collective life. Moreover, in failing to apply the same child protection standards to "intact" families, the best interests test implies that separation and divorce are pathological, and that "intact" nuclear families are themselves the only legitimate family form. As a result, the law repeatedly allows for the imposition on individual families of prevailing societal norms, scientific theories and judicial assumptions regarding family life and childhood needs.

Furthermore, while custody law declares that custody decisions are to be determined solely according to the best interests of the child, the current regime does not secure the welfare of children as a whole. In fact, by ensuring costly and invasive adjudicative proceedings and by encouraging strategic behaviour on the part of separating parents, the prevailing standards are detrimental to children's interests. As a result the present system fails even on its own terms.

Regardless, it is in its structural emphasis on child protection that our objection to the current regime is greatest. While child protection remains an important consideration in resolving issues of child custody, it cannot be the paramount or sole concern. Recognition of the multiplicity of family forms and acceptance of the role of law in the settlement of family disputes demands that custody law give priority to the function of family dispute resolution rather than that of child protection. Moreover, the unique character of the family requires a distinctive approach to this function of dispute resolution. Rather than formulating a set of abstract principles to determine the outcome of family disputes, this adjudicative approach would follow the context of existing family relationships and draw its normative stance from that context.

The two leading proposals for substantive custody reform – the primary caregiver presumption and joint custody – fail to realize this vision of family justice. First, while each may achieve some improvements over the ability of the current standard to advance the welfare of children as a whole, to the extent that they are conceived as presumptions for determining the child's best interests, they remain tied to a notion of custody law in which the protection of the child is primary. Second, to the extent that both embody a conception of justice, in each case, these visions are incomplete. Joint custody adopts a rigid and acontextual approach to family justice, disregarding real relationships within actual families. Similarly, while the primary caregiver approach at least attends to the context of individual families, it fails to adequately account for the rich diversity of relationships within these families.

Developments in family law over the last twenty years have exposed the inherent indeterminacy of the best interests test and have rendered contemporary custody law fundamentally anachronistic. Principles of gender equality and family autonomy have undermined the traditional presumptions that once lent certainty to the best interests test. So too, family autonomy contradicts the child protection rationale for the custody decision. No longer are separation and divorce associated with notions of fault and deviance. No longer can the family be identified with the monolithic vision of the "intact" nuclear family. Custody law must now be made to conform to the new pluralistic conception of the family.

Consequently, instead of enacting guidelines or presumptions regarding the best interests of the child, legislative reform must begin by abolishing the best interests test. Instead, the primary emphasis of custody law must be redirected toward the task of family dispute resolution. Substantively, this demands a relational and contextual approach rather than the rigid notion of individual rights reflected in current joint custody proposals. Procedurally, this requires institutional reforms designed to facilitate cooperative solutions to custody disputes without abandoning family members to the vagaries of private mediation.⁴¹⁵ While these more comprehensive tasks of reconceiving custody law have only just begun,⁴¹⁶ they are essential if we are to resolve custody disputes with care and with justice.

415. Shaffer, *supra*, note 410.

416. See, e.g., Abella, *supra*, note 134; Judith Ryan, "The Mediation of Family Law Disputes: Implications for Legal Practice and Ethics," Unpublished LL.M. Thesis, University of Toronto, 1986.